85-720

No. ———

Supreme Court, U.S.
FILED
OCT 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

CLEAR PINE MOULDINGS, INCORPORATED,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION OF CLEAR PINE MOULDINGS, INCORPORATED FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VERNE W. NEWCOMB
Counsel of Record

WAYNE D. LANDSVERK
NEWCOMB, SABIN, SCHWARTZ & LANDSVERK
Suite 1212
Commonwealth Building
421 S.W. Sixth Avenue
Portland, Oregon 97204
(503) 228-8446

BETTY SOUTHARD MURPHY
DAVID ALISTAIR GRANT
BAKER & HOSTETLER
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 861-1500
Counsel for Petitioner

STEVENS-NESS LAW PUB. CO., PORTLAND, OR. 97204 8510

QUESTIONS PRESENTED FOR REVIEW

1) Whether the Court of Appeals erred in enforcing an order of the National Labor Relations Board that the Board sought to disavow and rescind before the Court and in which the Board awarded backpay to individual discriminatees whose only effort to seek interim employment and mitigate loss of earnings over a period of several months consisted of registration with a state employment service.

2) Whether, in an adjucated proceeding of the National Labor Relations Board to determine the amount of backpay due individual discriminatees and to resolve the issue of each discriminatee's willful loss of earnings, an employer has the initial burden of producing individual discriminatees as witnesses or whether the NLRB General Counsel properly bears this initial burden of production.*

---

* In addition to the parties listed in the caption of this petition for a writ of certiorari, the International Woodworkers of America, Local No. 3-200, AFL-CIO, was also a party to the proceedings below. In accordance with Rule 28.1, Statement Concerning Parent Companies, Clear Pine Mouldings, Inc. is a subsidiary of Contact Lumber, Inc., an Oregon corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . . . i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 19

CONCLUSION 38

APPENDICES 1a

A. Order and Opinion of the . . 1a
Court of Appeals.

B. Order and Opinion of the . . 10a
National Labor Relations
Board.

C. Order and Opinion of the . . 51a
Administrative Law Judge.

D. Denial of Petition for . . . 147a
Rehearing.

E. Motion of the National . . . 149a
Labor Relations Board
for Remand.

TABLE OF AUTHORITIES

CASES: Page

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 27

Clear Pine Mouldings, Inc., 238 N.L.R.B. 69 (1978), enf'd, 632 F.2d 721 (9th Cir. 1980), cert. denied, 451 U.S. 984 (1981) 6

Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984) 2

Clear Pine Mouldings, Inc. V. NLRB, 632 F.2d 721 (9th Cir. 1980), cert. denied, 451 U.S. 984 (1981) 6

Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1978) 19

Ford Motor Co. v. NLRB, 305 U.S. 364 (1939) 30

Local 60, United Brotherhood of Carpenters v. NLRB, 365 U.S. 651 (1961) 20

M Restaurants, Inc. v. NLRB, 621 F.2d 336 (9th Cir. 1980) 28

NLRB v. Arduini Manufacturing Corp 394 F.2d 420 (1st Cir. 1968) 21

NLRB v. Food Store Employees Union, Local 347, 417 U.W. 1 (1974) 26, 27

TABLE OF AUTHORITIES CONTINUED

Page

NLRB v. Laborers International Union, 748 F.2d 1001 (5th Cir. 1984), cert. denied 105 S.Ct. 1845 (1985). 31

NLRB v. Madison Courier, Inc., 505 F.2d 391 (D.C. Cir. 1966). 21, 22, 28

NLRB v. Mastro Plastics Corp., 354 F.2d 170 (2d Cir. 1965) cert. denied, 384 U.S. 972 (1966). 32

NLRB v. Mercy Peninsula Ambulance Service, Inc., 589 F.2d 1014 (9th Cir. 1979). 21, 22, 25

NLRB v. Rice Lake Creamery Co., 365 F.2d 888 (D.C. Cir. 1966). . . . 32

NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953). 21

NLRB v. Westin Hotel, 758 F.2d 1126 (6th Cir. 1985). . 24, 31

Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). 13, 20

Saginaw Aggregates, Inc., 198 N.L.R.B. 598 (1972), enf'd, 482 F.2d 946 (6th Cir. 1973). 24

SEC v. Chenery Corp., 332 U.S. 194 (1947). 29

TABLE OF AUTHORITIES CONTINUED

Page

Service Employee International Union, Local 250 v. NLRB, 640 F.2d 1042 (9th Cir. 1981) 30

South Prairie Construction Co. v. Local 627, International Brotherhood of Operating Engineers, 425 U.S. 800 (1976) 29

Sure-Tan, Inc. v. NLRB, 104 S.Ct. 2803 (1984) 20, 26, 27

Top Manufacturing Co., 254 N.L.R.B. 976 (1981) 24

United States v. Lee Way Motor Freight, Inc., 625 F.2d 918 (10th Cir. 1979) 28

Universal Camera, Inc. v. NLRB, 340 U.S. 474 (1951) 28

STATUTES

28 U.S.C. § 1254(1). 2

29 U.S.C. § 160(c). 3, 19

29 U.S.C. § 160(e). 3

REGULATIONS

29 C.F.R. §§ 102.52-102.59. 7

29 C.F.R. § 102.57 8

OTHER AUTHORITIES

C. McCormick, Handbook of the Law of Evidence (3d ed. 1984). . . . 31

Daylin, Back Pay Under the National Labor Relations Act, 39 Iowa L. Rev. 104 (1958). 20

J. Wigmore, Evidence in Trial at Common Law (Chadbourne revised ed. 1981). 31

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO.

CLEAR PINE MOULDINGS, INCORPORATED,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR
THE NINTH CIRCUIT

Petitioner, Clear Pine Mouldings, Incorporated ("Clear Pine"), respectfully prays that a writ of certiorari issue for review of the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 4, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, 1a) is not reported. The decision and order of the National Labor

Relations Board (App. B, infra, 10a) and the decision of the Administrative Law Judge (App. C, infra, 51a) are reported at 268 N.L.R.B. 1044. They are also referenced in 115 L.R.R.M. (BNA) 1113, and 1983-84 NLRB Dec. (CCH) ¶ 16083. The Board's "Motion to Remand Case to the National Labor Relations Board" (App. E, infra, 149a) is also reproduced for the convenience of the Court.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1985. Clear Pine's timely petition for rehearing and suggestion for rehearing en banc was denied on July 10, 1985 (App. D, infra, 147a). This Petition is filed within ninety days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 10(c) of the National Labor Relations Act, 29 U.S.C. §160(c), provides in part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this [Act] . . . .

Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) provides in part:

> If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the Court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as

to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the Court shall be exclusive and its judgement and decree shall be final, except that the same shall be subject to review by the appropriate United States Court of Appeals if application was made to the District Court as hereinabove provided, and by the Su preme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

STATEMENT OF THE CASE

A. Preliminary Statement

Petitioner, Clear Pine, is a wood products manufacturer in Prineville, Oregon (App. C, infra, 53a). A strike occurred at Clear Pine in 1977 (App. C, infra, 52a). With a few exceptions not relevant here, the employees remained on strike until the strike terminated (App.

C, infra, 55a). At the conclusion of the strike in November, 1977, Clear Pine made a reinstatement offer to its striking employees that was expressly conditioned "on the availability of suitable employment." (E.R. 3; Resp. Ex. 2).[1/] Clear Pine did not indicate when such employment would be available. Most striking employees were reinstated between December 31, 1977 and March 31, 1978 (GC Ex. 1, pp. 1-13).

In the initial phase of this litigation, the National Labor Relations Board ("NRLB" or "Board") concluded that Clear Pine had committed various unfair labor

---

1/ "E.R." references denote Excerpts of the Record lodged in the Court of Appeals. References to "GC Ex._____, and "Resp. Ex. _____," denote exhibits introduced at the backpay hearing by the NLRB General Counsel and Clear Pine, respectively. "Tr. _____" references denote the stenographic transcript of the packpay proceedings before the Administrative Law Judge ("ALJ").

practices. See Clear Pine Mouldings, Inc., 238 N.L.R.B. 69, 77-80 (1978), enf'd, 632 F.2d 721 (9th Cir. 1980), cert. denied, 451 U.S. 984 (1981). The Board also concluded that Clear Pine's unfair labor practices caused a strike, and that its striking employees were unfair labor practice strikers. 238 N.L.R.B. at 79. The Board, therefore, ordered Clear Pine to reinstate the strikers, upon application, and to make the strikers whole for any losses caused by Clear Pine's failure to reinstate them in a timely fashion. Id. at 81. The United States Court of Appeals for the Ninth Circuit enforced the Board's Order, and this Court denied Clear Pine's petition for a writ of certiorari. Clear Pine Mouldings, Inc. v. NLRB, 632 F.2d 721 (9th Cir. 1980), cert. denied, 451 U.S. 984 (1981).

B. The Backpay Specification

This petition for a writ of certiorari arises out of the compliance proceedings conducted by the NLRB to determine the amount of backpay to which Clear Pine's striking employees are lawfully entitled. See generally 29 C.F.R. §§ 102.52-102.59 (NLRB Rules and Regulations governing backpay proceedings). Because Clear Pine and the Board could not agree informally on the amount of backpay owing to the employees, the Regional Director issued a backpay specification in the name of the Board detailing, inter alia, his computation of the net backpay due (See App. C, infra, 71a). Clear Pine filed an answer asserting that backpay should be reduced or eliminated with respect to employees who had failed

adequately to mitigate their loss of earnings.[2/]

C. The Claimants

As amended, the Regional Director's backpay specification included 65 individuals (E.R. 7; GC Ex. 1(j)). The ALJ and the Board ultimately disqualified 11 of these 65 individuals for various reasons, including strike violence and dismissal for cause (See App. B, infra, 14a); App. C, infra, 133a-138a). These individuals are not involved in this petition.

2/ As is customary in these cases, the Regional Director amended his initial backpay specification. See 29 C.F.R. § 102.57 (1985). When the backpay hearing began, the ALJ allowed Clear Pine to amend it answer to include a defense of willful idleness and failure to mitigate loss of earnings (Tr. 348). NLRB Rules and Regulations specifically and explicitly permit an ALJ to permit an employer leave to amend its answer after the opening of the hearing. 29 C.F.R. § 102.57 (1985).

The facts and circumstances surrounding 13 other individuals involve unique factual situations. The backpay awards to these 13 individuals are also not at issue in this petition.

This petition <u>does</u> involve the propriety of backpay awards to 41 claimants. Fourteen of these claimants testified that they made no effort at all to look for interim employment between the end of the strike and reinstatement, a period of up to five months in some cases.[3/]

3/ These 14 employees included the following: Winnie Koutsouris (Tr. 349-352), Peter Koutsouris (Tr. 352-355), Daniel York (Tr. 355-356), Arthur Morton (Tr. 357-363), Audrie Faye Jordan (Tr. 63-367), Debbie Miller (Tr. 368-372), Thomas Tugman (Tr. 481-483), Coleen Maw (Tr. 497-500), Darlene Forseth (Tr. 804-809), Allen Dendy (Tr. 812-813), Alonzo Hayre (Tr. 814-815), Thomas Ferguson (Tr. 911-916), David Dunn (Tr. 916-918), and William Carter (Tr. 920-926).

Twenty-seven other claimants did not testify at the backpay hearing. As to these individuals, the record is completely silent regarding both their availability for employment and their efforts to find jobs during the period for which backpay is sought. Virtually without exception, the appendices to the Regional Director's backpay specifications showed no interim employment for any of these individuals (GC Ex. 1(j)). In some cases, the specifications listed interim earnings as unknown (id.).

Although Clear Pine did not produce evidence regarding the specific efforts of each of the 27 claimants who did not testify at the backpay hearing,[4/] it did

---

4/ Clear Pine's ability even to discern the whereabouts of the backpay claimants in this proceeding was hampered by the Regional Director's failure to make timely disclosure of backpay questionnaires, which contained such basic information. (Footnote Continued)

present uncontradicted testimony, which the ALJ credited and accepted, that there were plentiful employment opportunities during the period between the end of the strike and the claimants' reinstatement (App. C, infra, 122a-126a). Representatives of other wood product manufacturers, and the Office Supervisor for the local Oregon State Employment

(Footnote Continued)

The Regional Director initially refused outright to provide these questionnaires to Clear Pine; the questionnaires were ultimately not provided until late in the first day of the hearing, upon the urging of the ALJ (Tr. 348). Two days later, Clear Pine was able to produce many, but not all, of the claimants to testify. As the ALJ noted during the hearing, the Regional Director's refusal to provide the backpay questionnaires was "a little hard to explain" (Tr. 349).

Further, of these 27 non-testifying individuals, there is no dispute that five individuals were unavailable to testify at the time of the backpay hearing. The ALJ's order -- adopted by the Board -- provided that the backpay awards for these individuals be held in escrow for one year "with disbursal or return as appropriate" (App. B, infra, 40a; App. C., infra, 144a).

Service characterized this period as one of better than normal business conditions and continuous hiring (App. C, infra, 122a-126a). The employers testified that, had the claimants applied, there would have been no impediment to hiring them based on their status as strikers (App. C, infra, 126a).

D. The ALJ and Board Decisions

The ALJ awarded backpay to all 41 claimants whose backpay entitlement is at issue in this petition (App. C, infra, 143a). The ALJ made no individual findings of fact concerning the adequacy of the mitigation efforts of each claimant. In essence, the ALJ treated the claimants as a class of strikers for purposes of backpay entitlement (See App. C, infra, 140a-141a).

The ALJ concluded that "the great number of individuals who simply registered for, and usually received,

unemployment compensation benefits . . . concededly engaged in no search for work or did so with only desultory effort." (App. C, infra, 127a) (emphasis added).

The ALJ nonetheless, held as follows:

> As a matter of law Respondent has not convincingly shown that any employee failed to mitigate damages by their [sic] conduct following the strike. The situation allowed a reasonable belief that reinstatement could occur any day, and the testimony of management officials from other wood products firms in the area, and from state functionary Bigelow, does not establish jobs readily available to these claimants. There is no correlation between the number of applicants and the hires actually processed, and the wide diversity between those who achieve interim earnings and those who hopefully waited is the exact illustration of human variances contemplated in the Phelps Dodge line of cases.

(App. C, infra, 140a-141a).[5/]

5/ The ALJ's reference to the "Phelps Dodge line of cases" is an allusion to this Court's decision in Phelps Dodge Corp., v. NLRB, 313 U.S. 177 (1941), which is discussed on p. 20, infra.

The ALJ adopted the Regional Director's backpay specifications for all employees whom Clear Pine did not call as witnesses (App. C, infra, 146a).

The Board summarily adopted the ALJ's Order requiring Clear Pine to pay specific backpay amounts to the 41 employees at issue in this petition (App. B, infra, 40a). The Board did not discuss or even comment upon the ALJ's treatment of the mitigation issues (id).[6/]

E. Proceedings Before the Ninth Circuit

On March 26, 1984, Clear Pine filed a Petition for Review of the Board's Order with the United States Court of Appeals for the Ninth Circuit. On July 27, 1984,

---

6/ As previously indicated, the thrust of the Board's decision was concerned with issues involving striker misconduct and termination for cause that are not before this Court (App. B, infra, 32a-33a).

after the filing of the record with the Court of Appeals but before the filing of Clear Pine's opening brief, the NLRB General Counsel, on behalf of the Board, filed a motion to remand the case to the Board (App. E, infra, 149a). In its motion, the Board stated that it "wishe[d] to reconsider certain issues regarding the amount of backpay due under [its] order." (App. E, infra, 150a).

In response to the contention of the intervenor-union that the Board was seeking a remand to apply new labor policy, the Board stated further as follows:

> This is not correct. The Board wishes to reconsider only that portion of its decision which addresses the adequacy of certain discriminatees efforts to mitigate backpay by seeking interim employment. The Board merely seeks to insure conformity with Board and Court decisions holding that backpay claimants must make reasonable efforts to mitigate backpay. [citation omitted] The Board has determined that it is not prepared at this time to defend that portion of

> its decision which addresses the adequacy of certain discriminatees efforts to mitigate backpay. Absent remand, the Court will not have the benefit of the Board's analysis regarding this issue.

Reply to Memorandum in Opposition to Motion to Remand at 1-2, Clear Pine Mouldings, Inc. v. NLRB, No. 84-7196 (9th Cir. August 24, 1984). The Court of Appeals denied the Board's Motion for Remand on October 3, 1984.

In its brief to the Ninth Circuit, filed in December, 1984, the Board pressed its contention that a remand was necessary and appropriate and stated that the "case should be remanded to the Board in order to permit the Board to make specific findings with respect to the adequacy of each backpay claimant's efforts to secure interim employment." Brief for Respondent at 6, Clear Pine Mouldings, Inc. v. NLRB, No. 84-7196 (9th Cir. December 21, 1984). The Board acknowledged to the Court that "through oversight the Board failed to

make necessary findings" (id. at 7) and asserted that "a remand is necessary because the omitted findings are ones for the Board to make in the first instance" (id. at 9). Further, the Board argued that "absent remand, backpay should be denied to employees who testified that they made no effort to find interim employment (id. at 11). The Board itself admitted to error in adopting the decision of the Administrative Law Judge (id. at 8).

Despite the Board's entreaties, the Ninth Circuit rejected the Board's request for remand, stating as follows:

> We deny the Board's request for reconsideration. The record as developed is sufficient for a backpay determination and the Board's decision adequately resolved the issues presented to it.

(App. A, infra, 5a). The Court of Appeals enforced the Board's order in its entirety (App. A, infra, 9a).

With respect to the 14 individuals who testified that their only effort to seek interim employment was registering at a state agency, the Court of Appeals enforced the Board's order on the ground that "the employees were returning to work rapidly and each of them could have reasonably expected to be back at Clear Pine on short notice . . . . The employees did not need to make, under the circumstances, a more diligent search for work" (App. A, infra, 7a).

With respect to the 27 individuals who did not testify, the Ninth Circuit simply stated that "[e]mployee testimony is not a requirement for awarding back pay. It is the employer who carries the burden of producing evidence and the testimony of the employees' efforts in the absence of the employer's specific demand before the ALJ is an accommodation, not a

requirement." (App. A, infra, 7a) (citations ommitted).

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's Enforcement of a Backpay Award to Individual Discriminatees Whose Efforts to Seek Interim Employment During a Several-Month Period Were Limited Solely to Registration with a State Employment Service Is Contrary to National Labor Policy, Decisions of this Court and Other Courts of Appeals, and the Board's Own Arguments Before the Court of Appeals

1. Under Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), the Board is empowered, upon determination that an employer has engaged in an unfair labor practice, to reinstate employees with or without back pay. 29 U.S.C. § 160(c) (1982). This Court has made clear that the backpay remedy is remedial, not punitive. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1978); accord,

Local 60, United Brotherhood of Carpenters v. NLRB, 365 U.S. 651, 655 (1961). Employees who are entitled to back pay are required to exercise reasonable diligence in seeking employment to mitigate their loss of earnings. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198-200 (1941); see, e.g., Sure-Tan, Inc. v. NLRB, 104 S.Ct. 2803, 2814 (1984) (noting Court's requirement "that the Board give due consideration to the employee's responsibility to mitigate damages in fashioning an equitable backpay award"). In Phelps Dodge, the Court sanctioned the deduction of losses of income willfully incurred by backpay claimants as a means of invigorating "the healthy policy of promoting production and employment." 313 U.S. at 200. As one commentator has noted, "the statute was not intended to encourage idleness." Daylin, Back Pay Under the National Labor Relations Act,

39 Icwa L.Rev. 104, 104 (1958); see, e.g., NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953).

In promoting the policies of production and employment and in discouraging idleness, the Courts of Appeal have repeatedly held that registration with a government employment office alone is not sufficient to establish reasonable diligence. See NLRB v. Mercy Peninsula Ambulance Service, Inc., 589 F.2d 1014, 1018-19 (9th Cir. 1979)(three job inquiries per month and registration with state employment office not reasonable diligence); NLRB v. Madison Courier, Inc., 505 F.2d 391, 396, 403-04 (D.C. Cir. 1974) (registration with state employment service and reliance on union "grapevine" not reasonable diligence); NLRB v. Arduini Manufacturing Corp., 394 F.2d 420, 424 (1st Cir. 1968) (registration with govern-

ment employment office and four visits to local employers not reasonable diligence).

The courts have relied on the fundamental policies of the Act in support of their conclusions that registration with a state employment service does not satisfy an employee's obligation to mitigate loss of earnings. The D. C. Circuit has concluded that such registration is "a mere formality which no one realistically expect[s] to be fruitful." NLRB v. Madison Courier, Inc., 505 F.2d at 403. The Ninth Circuit itself has stated that "[t]o hold otherwise would run contrary to the purposes of the backpay remedy, encourage idleness and reward slothfulness." NLRB v. Mercy Peninsula Ambulance Service, 589 F.2d at 1019.

2. The Ninth Circuit's decision in this case awarding back pay to 14 discriminatees whose only mitigation of damages was registering with a government

employment office is at ods with fundamental labor policy as expressed in Phelps Dodge and conflicts not only with its own precedent but the cases cited above in the First Circuit and the District of Columbia Circuit. The Court's rationale in support of its decision does not diminish this conflict or otherwise justify its decision.

The primary thrust of the Court of Appeals decision concerning the 14 discriminatees was that "the employees were returning to work rapidly and each of them could have reasonably expected to be back at Clear Pine on short notice" (App. A, infra, 6a).[7/] Yet, some of the

---

7/ The Court of Appeals also noted that there was "a lack of proof that other jobs were readily available" (App. A, infra, 4a). Yet, as noted above, the ALJ's decision contained detailed proof of the ready availability of jobs in the immediate geographic area (see pp. 7-8, supra, App. C, infra, 123a-126a). Contrary to the conclu-

(Footnote Continued)

backpay claimants were unemployed for over two months (GC, Ex. 1, pp. 1-13). Although the Board has allowed a brief grace period during which backpay claimants need not seek interim employment, the Board has never approved a grace period of this extended duration where, as here, an employer promises reinstatement when jobs become available. See, e.g., Top Manufacturing Co., 254 N.L.R.B. 976, 979 (1981)(three-week grace period); Saginaw Aggregates, Inc., 198 N.L.R.B. 598, 598 (1972), enf'd, 482 F.2d 946 (6th Cir.

(Footnote Continued)
of the ALJ that the Ninth Circuit tacitly accepted, evidence concerning the number of applicants and hires actually processed is relevant to the reasonableness of a backpay claimant's efforts to obtain interim employment. See NLRB v. Westin Hotel, 758 F.2d 1126, 1130 (6th Cir. 1985). As a matter of both law and fact, then, the ALJ and the Ninth Circuit should not have ignored evidence of the healthy job market, particularly in assessing the reasonableness of the mitigation efforts of employees who did not even test the job market.

1973). The Board itself stated in its brief to the Court of Appeals that it has never approved so long a grace period as in this case, and acknowledged that its award of back pay in these circumstances without a reduction for failure to mitigate loss of earnings was error. See Brief for Respondent at 8, Clear Pine Mouldings, Inc v. NLRB, Nos. 84-7196 and 84-7311 (9th Cir., Dec. 21, 1975). "A worker who has been the victim of an unfair labor practice is not entitled to simply await reimbursement from his or her employer for wages lost. . . ." NLRB v. Mercy Peninsula Ambulance Service, Inc., 589 F.2d at 1018-19. This Court should confirm this well-established principle.

3. The Ninth Circuit's enforcement of the backpay award to the 14 "state registrants" and its treatment of these discriminatees as a class is particularly indefensible and merits this Court's

review because the Board confessed error and petitioned the Court of Appeals to remand the case to it for further findings of fact. (App. E, infra, 149a-151a). The Board's petition for remand was compelled by well-established precedent of this Court concerning the proper distribution of authority between the Courts of Appeal and the Board.

The Court has recently reaffirmed that Congress has entrusted the Board, and not the courts, with the responsibility of promoting the purpose and policies of the Act for shaping Board remedies to individual circumstances. See, e.g., Sure-Tan, Inc. v. NLRB, 104 S.Ct. at 2812-13. The Board's authority is entitled to great deference by the courts and is subject only to limited judicial review. See, e.g., id. NLRB v. Food Store Employees Union, Local 347, 417 U.S. 1, 8-9 (1974). Thus particularly in

determining the application of Board remedies, the proper course for the court is not to make de novo determination of the issue, but to remand the case to the agency, thereby "afford[ing] to the Board the opportunity, through additional evidence or findings, to reframe its order better to effectuate [national labor] policy." NLRB v. Food Store Employee Union, Local 347, 417 U.S. at 10; accord, Sure-Tan, Inc. v. NLRB, 104 S.Ct. at 2816. By refusing to grant the Board's motion to remand the case, the Ninth Circuit, in effect, impermissibly substituted its judgment for the judgment of the Board.

Just as significantly, the Board's remand was required by this Court's well-worn principle that administrative agencies -- the NLRB included -- must make findings of fact supported by substantial evidence. See, e.g., Burlington Truck Lines, Inc. v. United States, 371 U.S.

156, 167-68 (1962); Universal Camera, Inc. v. NLRB, 340 U.S. 474 (1951). In its brief to the Court of Appeals, the Board explicitly stated not only that the ALJ had erred in applying the law -- as discussed above -- but that he had failed to make "factual findings requisite to the court's review." Brief for Respondent at 9, Clear Pine Mouldings, Inc. v. NLRB, Nos. 84-7196 and 84-7311 (9th Cir., December 21, 1984). These omitted findings concerning the reasonable diligence of each backpay claimant in seeking employment are for the Board to make in the first instance. See, e.g., M Restaurants, Inc. v. NLRB, 621 F.2d 336, 338 (9th Cir. 1980); NLRB v. Madison Courier, Inc., 505 F.2d at 396; cf. United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 937-39 (10th Cir. 1979) (eschewing class approach to mitigation issue under

Title VII of the Civil Rights Act of 1964).

The Ninth Circuit's decision was nothing less than a usurpation of the Board's authority. Indeed, because, as the Board explicitly conceded, the grounds upon which its action to the 14 state registrants was based were wholly inadequate or improper, the Ninth Circuit was "powerless to affirm the administrative action." SEC v. Chenery Corp., 332 U.S. 194, 196 (1947). This court should grant this petition and either reverse the decision of the Ninth Circuit with respect to the 14 "state registrants", or require that the Board make additional findings of fact on and conclusions of law concerning the mitigation efforts of each discriminatee, subject to later court review. See South Prairie Construction Co., v. Local 627, International Union of

Operating Engineers, 425 U.S. 800, 805-06 (1976).[8/]

B. The Burden of Producing Backpay Claimants as Witnesses at an NLRB Backpay Proceeding Rests on the NLRB General Counsel, not the Employer, When the Employer Has Alleged that the Claimants Have Incurred a Willful Loss of Earnings

Twenty-seven backpay claimants did not testify at the backpay hearing. The backpay specifications, most with no indication of any interim earnings, were the only evidence presented by the General Counsel to support an award of back pay to the individuals who did not testify.

8/ The Ninth Circuit cited two cases in support of its denial of the Board's request for remand -- Ford Motor Co. v. NLRB, 305 U.S. 364, 370 (1939) and Service Employees International Union, Local 250 v. NLRB, 640 F.2d 1042, 1045 (9th Cir. 1981). (App. A, infra, 5a). Neither case, however, involves the precise factual situation here, where the Board itself applied for leave to adduce material evidence and to correct its own error.

Clear Pine acknowledges that the defense of willful loss of earnings is an affirmative defense, and that the burdens of pleading and persuasion rest on the employer. See, e.g., NLRB v. Westin Hotel, 758 F.2d at 428; NLRB v. Laborers International Union, 748 F.2d 1001, 1005 (5th Cir. 1984), cert. denied, 105 S.Ct. 1845 (1985). The employer's burden of persuasion, however, does not translate into a burden of producing as witnesses at the backpay hearing the claimants whose alleged willfulness is properly at issue.[9/] The Ninth Circuit's decision

---

9/ As used in this petition, the term "burden of production" means the burden "of producing evidence satisfactory to the judge, of a fact in issue." C. McCormic, Handbook of the Law of Evidence, ¶ 336 at 947 (3d ed. 1984). The term "burden of persuasion" means "the burden of persuading the trier of fact that the alleged fact is true." Id., see 9 J. Wigmore, Evidence in Trial at Common Law, ¶¶ 7485-89 (Chadbourne rev. ed. 1981).

placing this burden of production on the employer is contrary to the decision of the Second Circuit in NLRB v. Mastro Plastics Corp., 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966) and the District of Columbia Circuit in NLRB v. Rice Lake Creamery Co., 365 F.2d 888, 891-92 (D.C. Cir. 1966).

In Mastro Plastics, the Second Circuit concluded that simply because the employer must raise the defense of willful loss of earnings in its pleadings, "it does not follow that the employer should be required to come forward with evidence by producing the discriminatees." 354 F.2d at 177. The Court stressed the relevance of the testimony of the claimants to the question of mitigation of loss of earnings, and noted that while the Board has some contact with the claimants when computing the backpay specification, the employer may have no such contact.

Id. The Second Circuit noted further that the claimants would be required to testify and be cross examined if they sued for back pay in their own right rather than being represented by the General Counsel. Id. Thus, requiring the claimants to testify presents no undue burden.

The Mastro Plastics court, then, established "a rule requiring a [back pay claimant] to testify before his award becomes final" when the defense of willful earnings is at issue. Id. While not shifting the burden of proving mitigation back to the Board, the court made clear that the Board has the burden of producing the claimants at the backpay hearing. Id.; accord, Rice Lake Creamery Co., 365 F.2d at 891-92.

In this case the Ninth Circuit placed the burden on Clear Pine to produce as witnesses each backpay claimant for whom it alleged a failure to mitigate loss of

earnings (App. A, infra, 7a). This burden is unreasonable when, as the Second Circuit noted in Mastro Plastics, the claimants' whereabouts are more readily accessible to the Board than to the employer. This burden is especially unreasonable in this case where the NLRB Regional Director initially refused Clear Pine's request for the backpay questionnaires containing the claimants' whereabouts, and did not in fact provide the questionnaires until late in the first day of the hearing. (Tr. 348). Under the circumstances, Clear Pine did remarkably well in producing more than half of the claimants to testify.

2. The overbreadth of the Ninth Circuit's conclusion on the burden of production issue is clearly demonstrated by the evidence Clear Pine did produce at the hearing. Indeed, Clear Pine did more than just merely allege the willful loss

of earnings.[10/] It produced extensive evidence from five area employers on the availability of employment in the area woodworking industry during the period in question. (App. C, infra, 123a-126a). These employers included direct competitors of Clear Pine who testified to the availability of jobs directly comparable to those previously held by the claimants with Clear Pine. Given this evidence, the testimony of 26 claimants as a representative sample, and the evidence discussed above that 14 discriminatees never looked for employment at all, an inference of willful

---

10/ Contrary to the Board's suggestion before the Ninth Circuit that Clear Pine did not raise the issue of willful idleness in a timely manner, (See Brief for Respondent at 13-14, Clear Pine Mouldings, Inc. v. NLRB, Nos. 84-7196 and 84-7311 (9th Cir. Dec. 21, 1984), the ALJ did allow Clear Pine, over the objection of the General Counsel, to amend the answer to include the defense of willful idleness. (Tr. 384).

idleness was warranted in the absence of the General Counsel's presentation of evidence of each non-testifying claimant's diligence in seeking interim employment.

3. The Ninth Circuit's categorical conclusion that "employee testimony is not a requirement for awarding back pay" (App. A, infra, 7a) effectively removes any reasonable check for control on backpay calculations. Where, as here, the whereabouts of the claimants are best known -- and perhaps only known -- to the NLRB General Counsel who prepares the backpay specifications and questionnaires, it is reasonable to require the General Counsel to produce the claimants at a backpay hearing, particularly where the employer has come forward with evidence of available employment opportunities in the area. The Ninth Circuit's decision to the

contrary is unreasonable, unfair, and contrary to better-reasoned precedent in the Second Circuit and the D. C. Circuit.

CONCLUSION

For the foregoing reasons, Petitioner, Clear Pine Mouldings, Incorporated, respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

VERNE W. NEWCOMB
Counsel of Record

WAYNE D. LANDSVERK
NEWCOMB, SABIN, SCHWARTZ & LANDSVERK
Suite 1212, Commonwealth Building
421 S.W. Sixth Avenue
Portland, Oregon 97204
(503) 228-8446

BETTY SOUTHARD MURPHY
DAVID ALISTAIR GRANT
BAKER & HOSTETLER
1050 Connecticut Avenue, NW
Washington, D. C. 20036
(202) 861-1500

Counsel for Petitioner,
Clear Pine Mouldings, Incorporated.

October, 1985

APPENDIX A

Nos. 84-7196/7311
NLRB #36-CA-3129

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLEAR PINE MOULDINGS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

FILED
JUNE 4, 1985
PHILLIP B. WINBERRY, Clerk

MEMORANDUM

Petition for Review and Cross-Petition for Enforcement of a Decision of the National Labor Relations Board Argued and submitted May 6, 1985, in Seattle, Washington

---

* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

Before: GOODWIN, SCHROEDER and BEEZER, Circuit Judges.

Petitioner seeks review of a decision of the National Labor Relations Board concerning back pay awards to employees of Clear Pine Mouldings, Inc., who participated in an unfair labor practice strike eight years ago.

The strike occurred in 1977 and was marked by much animosity. In late November, after the strike had lasted three months, Clear Pine accepted the union's offer to return to work and agreed that the striking employees would be offered reinstatement as soon as practicable. In fact, most were offered reinstatement between December 31, 1977 and March 31, 1978. This did not end the dispute, however, because unfair labor practice charges remained pending. The Board subsequently determined that

the strike concerned unfair labor practices and therefore the employees were entitled to immediate reinstatement plus back pay. Clear Pine Mouldings, Inc. (International Woodworkers Local 3-200), 238 N.L.R.B. 69 (1978), enforced, Clear Pine Mouldings, Inc. v. NLRB, 632 F.2d 721 (9th Cir. 1980), cert. denied, 451 U.S. 984 (1981).

Hearings were held before an Administrative Law Judge (ALJ) to determine the amount of back pay to be awarded. The ALJ found that the employees were entitled to back pay from the strike's start until the date of eventual return. As for finding interim work, the ALJ held that Clear Pine had not "convincingly shown that any employee failed to mitigate damages by their conduct following the strike." The ALJ took into consideration that the employees reasonably could have believed

that reinstatement might occur at any instant and, furthermore, there was a lack of proof that other jobs were readily available.

The Board adopted the ALJ's findings, but modified the order to award $84,977 in back pay to fifty-four employees. Clear Pine Mouldings, Inc. (International Woodworkers Local 3-200), 268 N.L.R.B. 1044 (1984). Clear Pine petitions this court for review of the order. The Board also asks for a remand of a substantial part of its order for further factual findings and reconsideration. The Board, in the alternative, cross-applies for enforcement of its order except for the portion which awards back pay to employees who testified they did not seek interim employment beyond registering at a state agency. The

union argues against any remand and for enforcement of the Board's award.

We deny the Board's request for reconsideration. The record as developed is sufficient for a back pay determination and the Board's decision adequately resolved the issues presented to it. See Ford Motor Co. v. NLRB, 305 U.S. 364, 370 (1939); cf. Service Employees International Union Local 250 v. NLRB, 640 F.2d 1042, 1045 (9th Cir. 1981) (court can remand if there is merit in the contention).

As to the merits, Clear Pine has not carried its burden of proving that any of the fifty-four employees failed to exercise reasonable diligence in locking for interim work during the back pay period. NLRB v. Mercy Peninsula Ambulance Service, Inc., 589 F.2d 1014, 1017-18 (9th Cir. 1979). Therefore, the Board was correct in finding that the

employees have fulfilled their duty to mitigate their back pay damages and are entitled to enforcement of the Board's order. See Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941).

This finding applies to all the employees involved. It is apparent that substantial evidence exists for the Board to award back pay to those employees who testified as to their diligent good faith efforts to obtain interim work. There is also sufficient evidence to support the Board's decision to award back pay to those employees who testified that their efforts were limited to registering at state agency. The Board found that the employees were returning to work rapidly and each of them could have reasonably expected to be back at Clear Pine on short notice. The Board in the past has also permitted victims of unfair labor practices an

adjustment period roughly equal in duration to the period here. E.g., Top Manufacturing Co., 254 N.L.R.B. 976, 979 (1981) (three weeks); Nickey Chevrolet Sales, Inc., 195 N.L.R.B. 395, 398 (1972) (about six weeks), enforced, 475 F.2d 1395 (3d Cir. 1973). The employees did not need to make, under the circumstances, a more diligent search for work. Finally, the Board's award of back pay to those employees who did not testify is supported as well. Employee testimony is not a requirement for awarding back pay. It is the employer who carries the burden of producing evidence and the testimony of the employees to their efforts in the absence of the employer's specific demand before the ALJ hearing is an accommodation, not a requirement. See Lewis v. NLRB, 681 F.2d 1154, 1156 (9th Cir. 1982); Lloyd's Ornamental & Steel

Fabrication, Inc., 221 N.L.R.B. 217, 218 n.4 (1974); see also NLRB V. Dodson's Market, Inc., 553 F.2d 617, 619 (9th Cir. 1977) (Board has wide discretion in selecting an appropriate back pay formula, and once it has done so, the burden is on the employer to produce evidence to mitigate liability).

As to Clear Pine's other contentions, this court finds them unpersuasive. The union did not clearly and unmistakably waive the employees' statutory rights to back pay when it offered to return to work. See NLRB v. Southern California Edison Co., 646 F.2d 1352, 1364 (9th Cir. 1981); See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983). Moreover, Clear Pine's own failure timely to invoke the Board's customary five-day rule, which excuses an employer from liability for back wages during the first five days of

the back pay period, precludes this court from deciding the matter now. Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665-66 (1982).

We enforce the Board's order.

APPENDIX B

Case #36-CA-3129

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

CLEAR PINE MOULDINGS, INC.,

and

INTERNATIONAL WOODWORKERS OF AMERICA,
LOCAL NO. 3-200, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On 9 March 1983 Administrative Law Judge David G. Heilbrun issued the attached supplemental decision. The General Counsel and the Respondent filed exceptions and supporting briefs, [1] and the Charging Party filed a brief in support of the judge's decision.

---

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2]

---

[2]The General Counsel has excepted to the judge's failure to grant its motion partially to strike the Respondent's answer to the backpay specification. The specification alleged that Robert Anderson and Rodney Sittser are entitled to backpay from the end of the strike to the time the Respondent makes them a valid offe r of reinstatement. The Respondent's answer to the specification alleged that neither Anderson nor Sittser had applied for reinstatement. At the backpay hearing, however, the Respondent adduced testimony in support of its argument that neither former striker is entitled to reinstatement and backpay because each had engaged in strike misconduct. The General Counsel now argues that interjecting the strike misconduct issue into the case at the hearing constituted an attempt by the Respondent to change its answer. The General Counsel contends that the Respondent knew of the alleged strike misconduct at the time it filed its answer and that the Respondent should have affirmatively alleged it in the answer. The General Counsel moves to strike the Respondent's so-called amended answer and requests that the Board not con-

(Footnote Continued)

findings,[3] and conclusions,[4] only to the

(Footnote 2 Continued)
sider evidence adduced on the strike misconduct issue. Even assuming that the Respondent should have affirmatively alleged the strike misconduct in its answer to the backpay specification, we are of the opinion that the General Counsel cannot now complain of this omission. The record reveals that the General Counsel never objected to the introduction of any testimony by several witnesses, including Anderson and Sittser, on the strike misconduct issue. In fact, the General Counsel fully and actively participated in the examination of these witnesses. At this point in the proceeding, the General Counsel is estopped by his failure to object at the hearing. Accordingly, we deny the General Counsel's motion partially to strike Respondent's answer.

[3]The Respondent has excepted to the award of backpay to Larry Sheffield, claiming that, until his reinstatement, Sheffield worked for a company other than the Respondent at a rate of pay
(Footnote Continued)

[4]The Respondent argues that the Board should apply what it calls the "special factors" doctrine. In so arguing, the Respondent refers to the unfair labor practices that the Board found it committed and claims that it engaged in those activities in detrimental reliance on Board law in existence at the time. The Respondent thus argues that the equities are so compellingly its favor as to outweigh the imposition
(Footnote Continued)

extent consistent with this Decision and Order, and to adopt the judge's recommended Supplemental Order as modified.

(Footnote 3 Continued)
higher than the rate the Respondent would have paid him. We find that this fact, standing along, is irrelevant to whether Sheffield is entitled to an award of backpay, because Sheffield's gross wages for hours actually worked would have been higher than his interim earnings if the Respondent had reinstate him.

The Respondent has excepted to the judge's finding that the Union did not undertake the duty of notifying striking employees when they should return to work. We find it unnecessary to rely on the judge's finding on this point, because the Respondent has not claimed that the Union actually failed to notify any employees or that any particular employee failed to apply for reinstatement due to lack of notice.

(Footnote 4 Continued)
of the traditional Board remedy here, i.e., the grant of backpay. We are not persuaded by the Respondent's argument. The Respondent has not demonstrated that this case is so factually or legally extraordinary as to warrant our departure from imposing traditional Board remedies. Moreover, the Respondent's contention is untimely, because it should have been raised at the unfair labor practice stage of this proceeding.

The present proceeding is concerned with issues of reinstatement and backpay calculation under the terms of the Board's Decision and Order reported at 238 NLRB 69 (1978), enfd. 632 F.2d 721 (9th Cir. 1980). We agree with the judge's determination as to the amount of backpay due to all claimants except Rodney Sittser and Robert Anderson, who shall be denied reinstatement and backpay, and Bruce Reed, who shall be denied backpay. Contrary to the judge, we conclude that Sittser and Anderson engaged in conduct justifying the Respondent's refusal to reinstate them and that Reed was lawfully terminated for failing to report his absence from work before the strike began.

1. The Strike Misconduct of Rodney Sittser and Robert Anderson.

A. The Facts

1. Rodney Sittser

One week prior to the strike Sittser and two other employees "cornered" employee Johnny Webb against a wall at work and told Webb he would have to go on strike as voted by the other employees. When Webb said that he had been on vacation when the strike vote was taken, the employees began shoving Webb, and Sittser stated that Webb should watch out because they might burn his house or garage or something. Webb testified that Sittser repeated this threat to him over the telephone on several other occasions.

Sittser also had a prestrike encounter with employee Don Clark at Clark's home. According to Clark, as the two men discussed the strike and the

possibility of employees dropping out of the Union, Sittser became progressively angrier. Clark heard Sittser make a phone call to Union Business Agent Phillip Douglass during which Sittser suggested that a group of union members visit an employee named Cecil Barber to "straighten him out." Sittser also told Clark that the hands of certain knife-grinding personnel should be broken. Clark testified that his experience with Sittser made him so nervous that he put his house up for sale in anticipation of getting a job elsewhere.

The final incident involving Sittser also involved Helen Wright, who had resigned from the Union at the start of the strike. Shortly after the strike began, Wright was leaving work at the end of her shift when Sittser flagged down her car and told her that she was taking her life in her hands by crossing

the picket line and would live to regret it. Wright testified that she took alternate routes to work after this conversation because Sittser's remarks frightened her.

2. Robert Anderson

When the night shift ended at 1 a.m. on 6 August 1977, there were 40 to 50 pickets outside the plant who were carrying baseball bats, tire irons, and ax handles and were accompanied by dogs. Nonstriking employee Don Close testified that picketers stopped a truck belonging to nonstriker Ron Reese, jerked open the doors, and broke the windows. Close identified striker Robert Anderson as using a 2-foot-long club to beat on the truck. Night-Shift-Superintendent Jerry Payne testified that he saw the doors of Reese's truck open with people hanging on the doors trying to pull Reese out. In addition, Payne saw nonstriking

employee Jerry Sherrer try to leave the plant on a motorcycle when a person Payne later identified as Anderson swung at Sherrer with a club.

As Close proceed out of the plant, picketers called him names and beat on his truck, causing a dent near a window. Close became so nervous at the prospect of being blocked in by the picketers ahead of him that he backed his truck up, knocking over Anderson in the process, and exited in another direction. Nonstriking employee Tom Tucker testified that Anderson hit Close's truck with a club, was knocked over when Close's truck rolled back, and then looked up from his position on the ground to threaten Tucker with the words, "I am going to kill you, you son-of-a-bitch,"[5] Nonstriker Steve

---

[5]Anderson was still carrying the club when he threatened Tucker, even though he had been knocked to the ground.

Hardt testified that, as he attempted to drive through the picket line, Anderson hit his car with a club, leaving a one-quarter-inch-deep dent in the rain gutter on the passenger side.

B. The Administrative Law Judge's Decision

The judge specifically discredited Rodney Sittser's denials and credited the testimony of Webb, Clark, and Wright that Sittser made verbal threats of violence. The judge also credited the testimony of Close, Payne, Tucker, and Hardt, and specifically found that on 6 August 1977 Robert Anderson carried a clublike object with him which he used to hammer on vehicles leaving the plant. Of particular note is the judge's inference, based on all the credited testimony, that Anderson went to the picket line "equipped and ready to engage in pugnacious behavior."

Despite these findings, the judge concluded that Sittser's strike-related threats and Anderson's picket line misconduct were not sufficiently serious to disqualify the two strikers from reinstatement. The judge observed that Sittser's verbal threats were not accompanied by any further actions and occurred only during a short period near the beginning of a 4-month strike. The judge also noted that Anderson's threatening conduct on the picket line was limited to a single incident during the first week of the strike. The judge concluded that these were minor, isolated acts of the type that the Board has excused as trivial misconduct not egregious enough to deprive strikers of the Act's protection.

C. Analysis

Section 7 of the Act gives employees the right to peacefully strike,

picket, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 7 also grants employees the equivalent right to "refrain from" these activities.

Previously, the Board has held that "not every impropriety committed in the course of a strike deprives an employee of the protective mantle of the Act" and that "minor acts of misconduct must have been in the contemplation of Congress when it provided for the right to strike..."[6] However, the Board has also acknowledged that "serious acts of misconduct which occur in the course of a strike may disqualify a striker from the protection of the Act."[7]

---

[6] Coronet Casuals, 207 NLRB 304, 305 (1973).

[7] Id. at 304.

The difficulty lies in deciding whether particular strike misconduct results in the loss of statutory protection the employees otherwise would have. In the past, the Board has held that verbal threats by strikers, "not accompanied by any physical acts or gestures that would provide added emphasis or meaning to (the) words," do not constitute serious strike misconduct warranting an employer's refusal to reinstate the strikers.[8] On the other hand, the Board has held that verbal threats which are accompanied by physical movements or contacts, such as hitting cars, do

---

[8] W. C. McQuaide, Inc., 220 NLRB 593, 594 (1975), enf. denied in pertinent part 552 F.2d 519 (3d Cir. 1977). See also A. Duie Pyle, Inc., 263 NLRB 744 (1982); Georgia Kraft Co., 258 NLRB 908, 912--913 (1981), enfd. 696 F.2d 931 (11th Cir. 1983), cert. granted 52 U.S.L.W. 3386 (Nov. 14, 1983) (No. 83--103); Arrow Industries, 245 NLRB 1376 (1979); MP Industries, 227 NLRB 1709, 1711 (1977).

constitute serious strike misconduct.[9] The Board summarized its standard for finding strike misconduct based on verbal threats in Coronet Casuals, where it stated that "absent violence . . . a picket is not disqualified from reinstatement despite . . . making abusive threats against nonstrikers . . .".[10]

We disagree with this standard because actions such as the making of abusive threats against nonstriking employees equate to "restraint and coercion" prohibited elsewhere in the Act and are not privileged by Section 8(c) of the Act. Although we agree that the presence of physical gestures

---

[9] Hedstrom Co., 235 NLRB 1198, 1198-99 (1978), enfd. 629 F. 2nd 305 (3d Cir. 1980); Pepsi Cola Bottling Co., 203 NLRB 183 (1973), enfd. in pertinent part 496 F.2d 226 (4th Cir. 1974); Alabaster Lime Co., 194 NLRB 1116 (1972).

[10] Coronet Casuals, 207 NLRB at 304--305.

accompanying a verbal threat may increase the gravity of verbal conduct, we reject the per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts. Rather, we agree with the United States Court of Appeals for the First Circuit that "[a] serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker."[11] We also agree with the United States Court of Appeals for the Third Circuit that an employer need not "countenance conduct that amounts to intimidation and threats of bodily harm"[12] In McQuaide, the

---

[11] Associated Grocers of New England v. NLRB, 562 F.2d 1333, 1336 (1st Cir. 1977), denying enf. in part to 227 NLRB 1200.

[12] NLRB v. W. C. McQuaide, Inc., 552 F.2d 519, 527 (3d Cir. 1977), denying enf. in part to 220 NLRB 593 (1975). We read the McQuaide standard to essen-

(Footnote Continued)

Third Circuit applied the following objective test for determining whether verbal threats by strikers directed at fellow employees justify an employer's refusal to reinstate: "'whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employer in the exercise of rights protected under the Act"'[13] We believe this is the correct standard and we adopt it.[14]

(Footnote Continued)
tially adopt a "reasonably tends to restrain and coerce" measure for the loss of reinstatement rights.

[13] Id. at 528 (quoting Operating Engineers Local 542 v. NLRB, 328 F.2d 850, 852--853 (3d Cir. 1964), cert. denied 379 U.S. 826).

[14] Previous Board decisions that failed to apply this standard, including the cases cited in fn. 8, above, are overruled to the extent they are inconsistent with our decision today.

In accordance with our usual practice, we shall apply the Third Circuit
(Footnote Continued)

The legislative history of the Labor Management Relations Act supports the adoption of such a standard. Although the Act specifically recogniezes the right to strike,[15] and although any strike which involves picketing may have a coercive aspect, it is clear that Congress never intended to afford special protection to all picket line conduct, whatever the circumstances.[16] The legislative history

(Footnote Continued)
standard to all pending cases in whatever stage. Midland National Life Insurance Co., 263 NLRB 127, 133 fn. 24 (1982). We would also apply an analogous standard to the assessment of strikers' verbal and nonverbal conduct directed against persons who do not enjoy the proection of Sec. 7 of the Act.

[15]Sec. 13 of the Act.

[16]See generally H.R. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., reprinted in Legislative History of the Labor Management Relations Act, 1947 at 542--544. "It is apparent that many forms and varities of concerted activities which the Board, particularly in its early days, (Footnote Continued)

of the Labor Management Relations Act clearly indicates that Congress intended to impose limits on the types of employee strike conduct that would be considered protected. The right to strike embodied in Section 13 of the Act was modified with the passage of the Taft-Hartley Act in 1947. The amendments to Section 13 included a provision that nothing in the Act shall be construed "to affect the limitations of qualifications on" the right to strike. The legislative history

---

(Footnote Continued)
regarded as protected by the Act will no longer be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the Act." Id. at 544. (I)n section 10(c) of the amended act... it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of back pay if such individual was suspended or discharged for cause, and this, of course, applies with equal force whether or not the acts constituting the cause for discharging were committed in connection with a concerted activity." Id. at 543.

of this amendment[17] indicates that it was designed, inter alia, to incorporate into the Act the restrictions on the scope of protected strike activities found by the Supreme Court in Fansteel Metallurgical Corp. v. NLRB.[18] In Fansteel, although the specific type of striker misconduct was different from that presented in the instant case, the reasoning of the Court is nevertheless applicable here. There, striking employees had seized their employer's plant. The Court held:[19]

> The seizure and holding of the building was itself a wrong apart from any acts of sabotage. But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company . . . or other unlawful acts in order to force

---

[17] Views of Senator Taft, Rep. No. 105 accompanying S. 1126, 80th Cong., 1st Sess., reprinted in Legislative History of the Labor Management Relations Act, 1947 at 434.

[18] 306 U. S. 240 (1939).

[19] Id. at 253.

> compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society. [Emphasis added.]

Interpreting Section 13 (even before modification of that section by Taft-Hartley), the Court held that "this recognition of 'the right to strike' plainly contemplates a lawful strike, ---the exercise of the unquestioned right to quit work."[20] The Court went on to state:[21]

> There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights.

(Footnote Continued)

[20] Id. at 256.

[21] Id. at 257--258.

There is also evidence in the legislative history of the Taft-Hartley Act that Congress was acutely aware of, and concerned with curbing, picket line violence in general.[22]

---

[22] For example, the House Committee on Education and Labor, by Congressman Hartley, stated:

> For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American workingman has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in section 1 of the National Labor Relations Act . . .
>
> The employer's plight has likewise not been happy . . . He has been required to employ or reinstate individuals who have destroyed his property and assaulted other employees . . . He has had to stand helplessly by while employees desiring to enter his plant to work have been obstructed by violence, mass picketing, and general rowdyism.

Rep. No. 245, on H.R. 3020, 80th Cong., 1st Sess., reprinted in Legislative History of the Labor Management Relations Act, 1947 at 295--296.

We believe it is appropriate, at this point, to state our view that the existence of a "strike" in which some employees elect to voluntarily withhold their services does not in any way privilege those employees to engage in other than peaceful picketing and persuasion. They have no right, for example, to threaten those employees who, for whatever reason, have decided to work during the strike, to block access to the employer's premises, and certainly no right to carry or use weapons or other objects of intimidation. As we view the statute, the only activity the statute privileges in this context, other than peaceful patrolling, is the nonthreatening expression of opinion, verbally or through signs and

pamphleteering, similar to that found in Section 8(c).[23]

In deciding whether reinstatement should be ordered after an unfair labor practice strike, the Board has in the past balanced the severity of the employer's unfair labor practices that provoked the strike against the gravity of the striker's misconduct.[24] We do

---

[23] This, of course, does not prevent a union from advising its members of the possible consequences crossing a picket line may have under lawful provisions of the union's constitution and bylaws.

[24] Coronet Casuals, 207 NLRB at 305 fn. 15. See also NLRB v. Thayer Co., 213 F.2d 748 (1st Cir. 1954), cert. denied 348 U.S. 883 (1955), which holds that, where collective action is precipitated by an employer's unfair labor practice, a finding that the employees' conduct is not protected under Sec. 7 does not, ipso facto, preclude the Board from ordering the employer to reinstate the employees if such an order would effectuate the purposes of the Act, and which uses the same balancing test to determine whether reinstatement is warranted.

not agree with this test. There is nothing in the statute to support the notion that striking employees are free to engage in or escalate violence or misconduct in proportion to their individual estimates of the degree of seriousness of an employer's unfair labor practices. Rather, it is for the Board to fashion remedies and policies which will discourage unfair labor practices and the resort to violence and unlawful coercion by employers and employees alike. In cases of picket line and strike misconduct, we will do this by denying reinstatement and backpay to employees who exceed the bounds of peaceful and reasoned conduct.[25]

---

[25] Balancing the misconduct of strikers against the seriousness of the employer's unfair labor practice is inappropriate because it condones misconduct on the part of employees as

(Footnote Continued)

Accordingly, we find that the Respondent's denial of reinstatement to Robert Anderson and Rodney Sittser did not violate the Act.

Applying the above standard to the present case, the acts of striker

---

(Footnote Continued)
a response to the employer's unfair labor practice and indeed makes it part of the remedy protected by the Act. Retaliation breeds retaliation and, in the emotion-charged strike atmosphere, retaliation will likely initiate an escalation of misconduct culminating in the violent coercive actions we condemn. It would be virtually impossible for all practical purposes for employees to know what is expected of them during a strike because balancing remains illusive and would be applied only long after the operative vents have occurred. Likewise we believe that the unclear and permissive standards previously employed by the Board have failed to adequately protect employee rights. Rather, it is our purpose to discourage any belief that misconduct is ever a proper element of labor relations. Only in this way can we honor the Act's commitment to the peaceful settlement of labor disputes without resort to coercion, intimidation, and violence. Therefore, we refuse to adopt a standard which will allow the illegal acts of one part to justify the wrongful acts of another.

Anderson, in carrying a 2-foot-long club, using it to swing at a nonstriking employee motorcyclist, and using it to beat on vehicles of nonstriking employees, are each sufficient to warrant denial of reinstatement, for each of these acts reasonably tended, under the circumstances, "to coerce or intimidate employees in the exercise of rights protected under the Act." The circumstances clearly indicate that violence or instilling a fear of bodily harm was the reasonably intended use of the club where strikers, at the time, were also carrying tire irons, baseball bats, and ax handles, and were accompanied by dogs. Such conduct is inherently coercive and intimidating with respect to the exercise of employees' Section 7 right to refrain from engaging in protected activities. Likewise, Anderson's verbal threat to kill

nonstriking employee Tucker was also unprotected since it was similarly coercive and intimidating with respect to Tucker's exercise of his Section 7 rights. This is particularly true here where Anderson was equipped with a weapon and had in fact been using it. Finally, Anderson's conduct in striking Close's truck with a club, an act of property damage, tended to coerce or intimidate employees in the exercise of their protected right to refrain from striking.

We also find that the conduct of striking employee Sittser was unprotected.

His threat to nonstriking employee Wright to the effect that she was taking her life in her own hands by crossing the picket line, and would live to regret it, clearly had a reasonable tendency to coerce and intimidate her

with respect to the exercise of her rights under the Act. Similarly, Sittser's repeated threats to employee Webb, which included threats to burn Webb's house, are egregious examples of statements which reasonably tend to coerce and intimidate employees in the exercise of statutory rights. Sittser's statement to employee Clark to the effect that the hands of certain knife-grinding personnel should be broken is coercive, because, although ostensibly it referred to employees other than Clark, it reasonably tended to coerce and intimidate Clark in the free exercise of his Section 7 rights. In this context, we also find that Sittser's less specific threat made in Clark's presence to "straighten . . . out" another employee likewise reasonably tended to coerce and intimidate Clark.

II. The Termination of Bruce Reed

On Friday, 29 July 1977, Bruce Reed was asked to work on Saturday, 30 July, and agreed to do so. Reed never reported for work, however, nor did he call in to say he would not be there. Reed went out on strike with the other employees on 1 August. He also went to the Company on 1 August to pick up a paycheck. At that time he was informed that he had been terminated for failure to report his absence from work. Reed testified that he knew he was supposed to call in if he could not show up for work, but claimed he did not call in because he did not have a telephone and doubted that his supervisor could be reached.

The judge found that "Reed cannot be considered validly terminated prior to acquiring status as an unfair labor practice striker. That was his plain

intention, and the intervening circumstance of an overtime assignment should not be available to this employer in frustration of that objective." We disagree.

The record establishes that the Respondent consistently maintained and enforced a policy of terminating employees who fail to report their absence when scheduled to work. The judge noted that two other employees, Chandler and Laudon, had been terminated legitimately for their failure to call in, and he found that they were not entitled to backpay. Bruce Reed falls within this same category. Because he was lawfully terminated, we find that he is not entitled to backpay.[26]

---

[26]No issue of reinstatement is raised as to Reed, as he has been reinstated.

ORDER

The National Labor Relations Board adopts the recommended Order of the Administrative Law Judge and orders that the Respondent, Clear Pine Mouldings, Inc., Prineville, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Supplemental Order except that the attached Appendix is substituted for that of the Administrative Law Judge.

Date, Washington, D.C., 22 February, 1984.

_____
Donald L. Dotson, Chairman

_____
Robert P. Hunter, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

MEMBERS ZIMMERMAN and DENNIS, concurring:

We join our colleagues in adopting the McQuaide [1] test as the appropriate standard for determining whether strike misconduct warrants denial of reinstatement. In so doing, we reject the previous Board rule that a verbal threat could never justify denial of reinstatement in the absence of physical gestures[2]. Furthermore, we agree that the

---

[1] NLRB v. W. C. McQuaide, Inc., 552 F.2d 519, 527 (3d Cir. 1977), denying enf. in part to 220 NLRB 593 (1975).

[2] Member Dennis joins her colleagues in overruling past Board decisions that are inconsistent with the new standard. See fns. 8 and 14, above. Member Zimmerman participated in the decision in Georgia Kraft Co., 258 NLRB 908 (1981). On further consideration, he believes that, to the extent the Board's test there was described as precluding a denial of reinstatement solely because physical gestures or violence did not accompany the statements under consideration, the test was too narrow. In his view, the absence

(Footnote Continued)

McQuaide standard applies not only to misconduct directed at nonstriking employees but also, by analogy, to

(Footnote Continued)
of physical gestures or gestures or violence, though a consideration in such cases, is not dispositive of whether reinstatement of an employee is an appropriate exercise of the Board's responsibility to remedy unfair labor practices. He believes that in adopting a standard that encompasses threats that are wholly verbal, however, the Board must take care not to condemn statements which are not reasonably likely to instill fear of physical harm. Under common law and statute, threats unaccompanied by acts ordinarly are not illegal or actionable. The first amendment protects pure speech from governmental restraint, even protecting a threat to kill where the circumstances show it to be hyberbole. Watts v. United States, 394 U.S. 705 (1969). The Board's application of the McQuaide test of coercive tendency must be informed by the knowledge that picket line actions often include tense, angry, and hostile confrontations in which emotions run high and threats are hurled that cannot reasonably be interpreted as auguries of violence. The Board must take care not to impose on industrial disputes a code of ethics alien to the realities of confrontational strikes and picket lines and contrary to our national tradition of free speech. See NLRB v. W. C. McQuaide, Inc., 552 F.2d at 528, and cases cited in fn. 20 therein.

strikers' retaliation against nonemployees such as supervisors.[3] As the First Circuit held in Associated Grocers, the common question is whether the particular strike misconduct "in the circumstances reasonably tends to coerce or intimidate."[4]

Although we join Chairman Dotson and Member Hunter in adopting the McQuaide test, we do not adopt their reasoning in part 1.C. including their analysis of the right to strike, Section 8(c) of the Act, and the legislative history of the Act. We rely instead on the circuit court opinions in McQuaide and Associated Grocers.

---

[3]See fn. 14, above, and Associated Grocers of New England v. NLRB, 562 F.2d 1333, 1337 (1st Cir. 1977), denying enf. in part to 227 NLRB 1200.

[4]Id. at 1336.

Applying this standard, we agree with our colleagues that Sittser engaged in strike misconduct that reasonably tended to coerce or intimidate other employees. Sittser and two other employees "cornered" employee Webb against a wall at work to insist Webb go on strike; when Webb was equivocal about his intentions, the employees began shoving Webb, and Sittser threatened to burn Webb's house or garage. Sittser repeated this threat to Webb over the telephone several times. Sittser also told employee Clark that the hands of certain knife-grinding personnel who might drop out of the Union should be broken. Further, Sittser stopped Wright's car as she was leaving work to tell her she was taking her life in her hands and would live to regret it. Sittser's remarks were not ambiguous,

but rather were clear threats of property damage and bodily harm.[5]

Similarly, we concur in our colleagues' finding that Anderson's conduct reasonably tended to coerce or intimidate employees within the meaning of the standard we have adopted. Anderson carried a 16-inch-long wooden club on the picket line, brandished it in a menacing fashion toward nonstriking employees leaving the plant, swung it at a nonstriking employee who was driving a motorcycle out of the employee parking lot, and used it to hit at least three vehicles that nonstriking employees were driving out of the employee parking lot, causing at least one dent in a vehicle

---

[5]Because this conduct warranted denying Sittser reinstatement, we would find it unnecessary to rely on Sittser's statements during a telephone call to Union Business Agent Douglass which employee Clark overheard.

he hit. Anderson was in the middle of a crowd of 40 to 50 pickets that night, who were blocking egress from the employee parking lot, trying to pull nonstriking employees out of their vehicles, and beating on vehicles with clubs. After being knocked down when nonstriker Close backed up his truck in order to get around the crowd to leave the plant, Anderson threatened to kill nonstriker Tucker, who happened to be nearby at the time. The Act does not extend its protections to such obviously frightening conduct as carrying and swinging a weapon, using it to inflict damage to vehicles, and threatening to kill a nonstriker.[6]

---

[6]While Anderson's threat to kill arguably may have been associated with Close's knocking him down, Anderson did not direct his threat to Close, but rather threatened Tucker, who had done nothing to provoke him. In finding that Anderson was engaged in misconduct, Member Zimmerman does not rely on the incident involving Anderson and nonstrikers Close and Tucker.

Accordingly, we would deny reinstatement and backpay to Rodney Sittser and Robert Anderson. From an examination of all of the circumstances present in this case, particularly that Sittser and Anderson directed their misconduct against innocent employees who are protected by the Act, we would find that their reinstatement would not effectuate the policies of the Act. See generally Mosher Steel Co. v. NLRB, 568 F.2d 436 (5th Cir. 1978); NLRB v. Thayer Co., 213

F.2d 748 (1st Cir. 1954), cert. denied 348 U.S. 883 (1955).[7]

Dated, Washington, D.C. 22 February, 1984.

Don A. Zimmerman, Member

Patricia Diaz Dennis, Member
NATIONAL LABOR RELATIONS BOARD

[7] In all other respects we agree with Chairman Dotson and Member Hunter.

APPENDIX

Beverly Bishop	$2,548
Juanita Burr	1,212
William Carter	1,467
Roy Chambers	1,175
Larry Chancellor	69
Oliver Chandler	1,409
Allen Dendy	1,158
David Dunn	1,263
Raymond Dunn	1,207
Donna Winget	1,069
Charlotte Evans	1,702
Thomas Ferguson	1,563
Darlene Forseth	1,078
Wanda Freese	3,062
David Fuller	1,033
Alonzo Hayre	1,515
Kenneth Heitz	923
Michael Hensley	1,662
Maximiano Hernandez	1,506
Douglas Holt	1,181
Laura Jones	834
Audrie Jordon	1,033
Lauren Kelhoyoma	1,128
Daniel Kinnear	559
Peter Koutsouris	1,703
Winnie Koutsouris	1,394
Colleen Maw	1,224
Henry McLamb	1,114
Douglas Menges	1,823
Donald Meritt	1,504
Debbie Miller	1,776
Janice Miller	1,308
Arthur Morton	1,017
Mary McKinney	792
Rose Mary Nelson	1,755
Don Pemberton	1,099
Rodney Prewitt	1,703
Karen Pryer	1,304
Eunice Rice	837
Sandra Clem	996

Larry Sheffield	457
Jim Smith	2,682
Maxine Jones	2,992
Lisa Gonser	1,421
Lucille Streetman	992
Thomas Tugman	2,969
Marvin Weger	1,023
Melvin Weger	1,623
Richard Whittenburg	1,281
Jean Williams	1,538
Daniel York	1,188
James Hensley	6,068
Richard Zimmerman	1,033
Carl Chancellor	7,085

APPENDIX C

Case #36-CA-3129

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

CLEAR PINE MOULDINGS, INC.,

and

INTERNATIONAL WOODWORKERS OF AMERICA,
LOCAL NO. 3-200, AFL-C10

Daniel R. Sanders, Counsel for
the General Counsel.
Rick W. Roll, Tillamook, OR for
the Union.
Verne W. Newcomb, Portland, OR
for Respondent.

SUPPLEMENTAL DECISION

DAVID G. HEILBRUN, Administrative Law Judge:

On August 14, 1980 the United States Court of Appeals for the Ninth Circuit entered judgment on its earlier opinion affirming the National Labor Relations Board's Order as reported at 238 NLRB 69. In this earlier case unfair labor practices were found to

have been committed by Clear Pine Mouldings, Inc., called Respondent, the remedy for which required Respondent to take certain affirmative action, including reinstatement of unfair labor practice strikers with backpay, dismissing, if necessary, employees hired subsequent to the commencement of a strike on August 1, 1977. The Board's Order further required Respondent to make whole any employee who lost money as a result of unilateral institution of substitute health insurance coverage. The strike was found to have been "direct[ly] caused" by Respondent's "dilatory, surface bargaining" over a course of negotiations earlier in 1977.

Controversy having arisen over the amount of backpay, if any, due under terms of the Board's Order, the issues raised in a backpay specification dated August 31, 1981 were heard as supple-

mental proceedings at Bend and Prineville, Oregon, during July and August 1982.

Upon the entire record, my observation of witnesses and consideration of post-hearing briefs, I outline the following:

Setting of the Case

Respondent is a wood products manufacturer in Prineville, Oregon, employing a workforce that at time has exceeded 300 persons. International Woodworkers of America, Local No. 3-200, AFL-CIO, called the Union, has been certified as exclusive collective bargaining representative for production and maintenance employees since 1965, and from that time onward has reached a series of labor contracts for the plant. The last of these, having a 2 year duration, expired on June 1, 1977. Renewal negotiations opened with the

Union's written request dated March 14, 1977, and proceeded thereafter both before and during the described strike. Respondent was represented in the process by Vice President and General Manager Thomas S. "Stu" Turner, Personnel Manager Robert Lockyear, Attorney Verne W. Newcomb, and others, while the Union's chief negotiators were Business Agent Phillip Douglass, and I.W.A. Western States Regional Council No. 3 Vice President Hugh Kidwell.[1] A 5-member committee of Respondent's employees also participated in the bargaining process on the Union's behalf.

After approximately 3 months of strike activity, Douglass and Kidwell

---

[1] D.C. "Gundy" Gunvaldson, President of Regional Council No. 3, also attended a significant bargaining meeting that occurred on October 18, 1977.

delivered Turner a letter November 21, 1977. It was signed by Kidwell and read:

> The strike against your Company will officially end on November 28, 1977 at 12:01 a.m., your employees are ready, willing and want to return to work.
>
> This letter is on behalf of each and every former striking employee, and it constitutes an unconditional offer and demand by your former striking employees to return to work for your Company.
>
> We re-emphasize that this return to work demand is unconditional. There are absolutely no conditions of any kind--express, implied or otherwise. Any and all prior statements, discussions, letters, agreements and everything else of every kind and nature that can or may be construed as conditions upon return to work of strikers, or in any manner inconsistent with this request, are hereby rescinded, revoked and are of no effect.
>
> Your former striking employees demand that you return them to work on November 28, 1977 or as soon as each employee can receive proper notification. Demand is hereby made that you displace striker replacement workers employed by you during the strike, if or as may be necessary to ensure return of strikers to work.

> Please give this your immediate attention. We stand ready to assist upon request.
>
> Separate and apart from the above, we, the International Woodworkers of America, stand ready to continue contract negotiations with your Company as soon as a meeting can be arranged.

Turner made a written reply to Kidwell on November 25, 1977 reading:

> In answer to your letter dated November 21, 1977, and confirming our telephone conversation of November 23, 1977, with Phil Douglas, we suggest that any individual strikers who apply for reinstatement to contact the personnel office. Reinstatement will of course be conditioned on the availability of suitable employment and resolution of any outstanding charges of strikers' misconduct involving individual applicants.

On the occasion of October 18, 1977, a major effort had been made by the parties to resolve the strike of then over 2-1/2 months duration. A full complement of individuals assembled for this meeting as scheduled at a Prineville motel under auspices of a federal

mediator. Douglass testified that Gunvaldson, as experienced president of the entire Regional Council for this area of the industry, traveled to such particular meeting in an attempt to lend further good offices toward resolution of the stubborn and difficult dispute. In the course of what was recorded as a session spanning more than 3 hours (primarily caucusing time), Gunvaldson voice a summation of what Kidwell had said respecting a Union proposal for ending the strike. According to notes of the meeting, made a part of this record as the Union's only documentary evidence, Kidwell had broached the subject of discontinuing strike action during the last 25 minutes of the session and following an extended caucus. As taken by the Union's negotiating committee secretary, the minutes

of this final portion of the meeting read, in part, as follows:

> NEWCOMB: The company hasn't anything further to say at this time.
>
> KIDWELL: For a matter of record we are proposing an unconditional return to work for all employees and continue to bargain in good faith and make every effort to resolve this in the near future.
>
> NEWCOMB: We have no opposition to bargaining in good faith, but we must ask you if that offer is good for the 106 number and if the company advises you that there are a number of people who there is no intention to reinstate, and would not offer reinstatement.
>
> KIDWELL: Its our feeling you are prejudging people, who ever they are an those people are entitled to a fair hearing. So our position would include everyone with an unconditional return to work. As far as your proposal we are not necessarily rejecting your proposal in its entirety, but what you proposed on 8% is below all the information that we have been able to compile as to what has been negotiated through out the moulding industry.
>
> NEWCOMB: The principle company that we heard was Doris and that settled with an other organization, the settlement was 8% the first year, and August 1977 cancelled out

their pension plan and continued with company sponsored health and wealth, I've heard of no other moulding companies with settlements, some have secondary, none that are competitive that have exceeded 8%. Only settlement that TOC represents is Doris. LPIW settlement is what you're saying you don't like but not sweeping it off.

KIDWELL: Yes, not.

NEWCOMB: We have no other offer, and not ready or prepared to at this time make offer.

KIDWELL: We are not prepared at this moment to make a counter proposal.

NEWCOMB: We don't have any further offers or proposals to make at this time.

GUNVALDSON: So that it is vividly clear and understood, in order to take and restore relations that must exist with our employee and management, or decision maker, Hugh's statement is correct and should be understood.

We are now making a firm proposal to you for an unconditional return to work that includes all employees and will immediately resume work and continue to organize to affect a settlement that would be economical to the company and to your employees who are now on strike.

NEWCOMB: As you saying some of your group would return if the rest would not? The company does have, as I have told Hugh, and the mediator, a list of people, who by their conduct, disqualified them, and I won't go into that or the length of the list. Are you saying that some of your group, that if the persons not on this list if, and we have several right now, would everyone be willing to come back to work, but those that the company would not take back. Are you saying its everybody or nobody?

KIDWELL: You said it right there.

NEWCOMB: We will continue to examine that list.

KIDWELL: You said you have nothing further to offer or say?

NEWCOMB: Not at this time.

KIDWELL: We haven't either, but hope as soon as possible we can continue negotiations subject to call by the mediator.

Gunvaldson died approximately 2 weeks later, and the parties presently stipulate that Kidwell is unable to appear for medical reasons and that no adverse inference is to be drawn from the Union's failure to produce him as a witness. Douglass testified in a manner

generally harmonious with these minutes, while committee member Daniel York added that those comprising the rank-and-file negotiating body, including himself, were well aware in advance of what Gunvaldson would propose or confirm. Faye Jordan, a retired employee and former negotiating committee member, added that the tone of Gunvaldson's brief involvement was based on "something [which] had to be done" about the stalled progress toward a new contract.

Attorney Newcomb, testifying by narration, recalled that following the described meeting Gunvaldson telephoned him to urge a waiving of strike misconduct accusations in the context of all strikers being but back to work. Newcomb asserted that he told Gunvaldson on this occasion that Respondent was amenable to restoring all the people as jobs became available, except for two or

three special cases involving egregious misbehavior.

It was following this that Douglass and Kidwell devised a course of action from which the November 21, 1977 letter resulted. Once having so decided, a comprehensive array of notification techniques (word of mouth, telephoning, CB radio communications and Union hall notices) was set in motion to marshall members for a needful special meeting. This ensued with Kidwell reading the proposed letter, fielding debate and conducting a vote which ratified the letter. Delivery of the letter to Turner, with Douglass accompanying, followed immediately. Douglass testified that one or two days after delivery of the letter he had a conversation with Lockyear (or possibly Turner) having to do with "the mechanics" of people returning to employment. Douglass

recalled comprehending that Respondent did not want the total group of strikers to appear at one time and for this reason an agreement arose which contemplated sending the strikers in on a "staggered basis." Douglass was soon to supervise the process by which members gathered at the Union hall and were sent into the company in groups of five or seven on an interval basis that went into a second day. Douglass made the point that in general the persons making up such groups took their lunches on the day of appearance based on the thought of starting back to work.

Turner's version concerning aftermath of the strike was that upon delivery of the Union's letter dated November 21, 1977, and Kidwell's accompanying remarks that the strike was over and all individuals "unconditionally" wished to resume work, he had conversed further

with Kidwell at the time saying that Respondent "would bring the people back as jobs become available." He also recalled subsequently speaking with Douglass, probably by telephone, to suggest that the group appearance technique be used because the company office was to small and would generate confusion. Turner added in his testimony that in so speaking with Douglass he pointed out how "it would help" if the Union made contact with strikers and assisted them in applying for reinstatement. Turner denied giving any indication that individuals would actually be put back to work immediately upon their appearance.

Turner enlarged on his testimony at a later point in the hearing by recalling how he had focused on the union's letter a day or so after delivery and became "a little bit alarmed" because

its wording did not seem to accord with "the agreement that we had as to how the strike would end" and embodied the incorrect implication that Respondent would have the difficult responsibility of making contact with strikers who could be well dispersed after the passage of 4 months from when they had last actively worked. This spurred Turner to write his letter dated November 25, 1977, the contents of which he noted were never objected to by Douglass. Turner recalled the phenomenon of people starting to show up at the plant in small groups to apply for reinstatement at the expectable time, and that many individuals were put back to work as jobs became available. Turner expressly testified that business was good in the fall of 1977, particularly as to October following which an estimated 25 percent drop in business

occurred as continuing through December, but that a spurt then happened resulting in January 1978 being "probably the best (he'd) seen in this business."

Following commencement of the strike on August 1, 1977, Dick Frambes, a retired law enforcement officer and later investigator for Respondent, became assistant personnel manager under Lockyear. Lockyear's testimony was more definite concerning principles applied by Respondent, including that interviewees seeking reinstatement were questioned as to their exact availability for return, where they could be located and whether they were free to work any shift. Lockyear denied that the process involved indicating to such persons when they would be called to work. As will be covered in certain individual cases, both personnel functionaries had consid-

erable contact with former strikers both in person and by telephone.[2]

Pleadings

The backpay specification (as amended) covers 63 persons,[3] and it is structured on a "representative employee(s)" theory of calculating gross backpay. General Counsel contends that Respondent was under a duty to forthwith reinstate all persons covered by the

---

[2]They also had extensive contact with numerous individuals before the strike was over, and a number of such contacts give rise to particular issues under the backpay specification. Frambes added his somewhat uncertain recollection that in dealing with a striker's reinstatement prospects the company tended to use "a seniority list."

[3]Originally 62 former employees were listed, however, General Counsel withdrew Tina Jones from consideration by motion made in the course of hearing. This was counterbalanced, and more, by the later addition of Richard Zimmerman and Carl Chancellor as claimants.

Union's assertedly unconditional offer to end the strike in contemplation of strikers returning to work. The underlying litigation established their status as unfair labor practice strikers, as to whom reinstatement would be absolute even to the extent of displacing those previously hired in replacement. General Counsel alluded to a customary "5-day rule" whereby employers so situated could react to the end of such a strike and incur backpay liability only for any excess over such time. General Counsel contends that this customary approach should not be applied here, because overall revelations allegedly show that Respondent did not recognize its duty,[4] and for that

---

[4]As of late 1977 the underlying unfair practice allegations were about to be heard by Administrative Law Judge James M. Kennedy, and this occurred over the span of December 6-8, 1977. His

(Footnote Continued)

reason the underlying purpose of the 5-day rule is not present. Accordingly the backpay specification does not admit of this grace period, an the typical date for commencement of monetary liability is the point of November 28, 1977 when the Union fixed an official termination of its strike.

In fact, most strikers were returned to the plant by early 1978, and this condition constitutes the principal patter found in the backpay specification. The document shows in comprehensive fashion, by calendar quarter, a tabulation of equivalent earnings from one or more similarly situated (repre

---

(Footnote Continued)
decision issued June 14, 1978 and the conclusions and recommended Order there embodied thus became the first adjudicative basis for the now-settled characterization that an unfair labor practice strike is what had been underway during the latter months of 1977 (until terminated in late November that year.)

sentative) employees associating to what a particularly discriminatee would have earned had their reinstatement been prompt and complete, including re-establishment of an appropriate wage rate under all the circumstances. This theory of gross backpay is rendered in detailed appendix sheets to the backpay specification, on which admitted interim earnings and pertinent offsetting expenses of the search for work are also shown. On January 14, 1982 an Amendment to Backpay Specification issued, substituting and modifying appendixes in various regards, including adding Richard Zimmerman and Carl Chancellor to the list of claimants, as well as revising a number of earlier net backpay amounts in individual cases.[5] The

---

[5]These changes represented "technical" adjustments of computation by the compliance officer, and the curing of inadvertence where detected.

resultant grand total of all claimed monetary liability, after allowing for Tina Jones being dropped from this proceeding and taking into account what her claimed total net backpay had been, is $252,013. The Regional Director expressly reserved the right to compute and claim further gross backpay subsequent to the computation cut off date of August 31, 1981, in terms of contentions that proper offers of reinstatement have not as yet been made to certain individuals.

Respondent filed written answers to both the backpay specification and the amendment thereto. Upon commencement of the hearing, General Counsel moved to partially strike these answers, in particular regard to a failure of proposing any alternative backpay formula to that routinely denied in the answers. General Counsel cites Airports

Service Lines, Inc., 231 NLRB 1272 and 3 States Trucking, Inc., 252 NLRB 1088, in premising an argument based on Section 102.54 of the Board's Rules and Regulations, from which it is contended that this section, and settled doctrine relating thereto, requires a Respondent to clearly please an alternative to any reasonable backpay formula that has been devised, or suffer the consequences of having stated formula admitted as being true. General Counsel prevailed on this motion, and now seeks to further strike Respondent's answers insofar as they do not allege defenses that associate to the colloquy made over the entire 6 days of hearing as spanning 5 weeks time, or to the evidence itself in particular cases. Upon consideration of this point I am satisfied that Respondent has fairly and fully articulated its position on the numerous individual issues

raised in the backpay specification, and I decline to broaden the ruling on General Counsel's Motion to Partially Strike. Cf. Sheet Metal Workers Local 13, etc., 266 NLRB No. 10.

Issues

There are a variety of issues to be resolved from this litigation. In a chronological sense, the process begins with ascertainment of whether certain individuals appearing as claimants in the backpay specification were employed as of the time a strike commenced on August 1, 1977, or were terminated at or soon after such commencement. The major issue of the case concerns events occurring at and shortly after the midnight hour of Friday, August 5, 1977 and through Saturday, August 6, 1977 at the plant premises, as to which Respondent contends that misconduct as engaged in by Robert ("Andy") Anderson

was of a character and degree that warranted his termination from employment retroactively to that time, or, alternatively, disqualified him from any right of reinstatement and concommitant entitlement to backpay.[6] Proceeding in point of time as it passed from August into November 1977, there are issues of whether certain individuals were terminated by reason of failure to accept offered employment under circumstances which gave rise to an asserted entitlement for the employer to consider them to have repudiated any desire for further or continued employment, or, as relating to individuals who quit, constructively quit, or abandoned their position of employment, or as related to

---

[6] A comparable issue with respect to Sittser also embraces his alleged conduct in expressing verbalisms to certain non-striking employees, both before and after the strike began.

whether such individuals correspondingly abandoned the strike then in progress.

Beyond this time span the fundamental issue of the case arises in terms of whether or not the Union made and maintained an unconditional offer of return to work on behalf of all strikers, and an associated issue of whether the Union assumed to itself, gratuitously or otherwise, a responsibility of seeing that all strikers actually interested in participating in a resumption of active employment, as presumably contemplated by the blanket notice of strike termination and desire of strikers to return to work, were notified of steps to be taken and monitored as to whether or not they made an appropriate, timely presentation of themselves. As to this "fundamental" issue, Respondent contends that the Union agreed to undertake a presentation

of all persons covered by the return to work offer, and that any individual instance in which a person did not so appear would relieve the employer of any liability toward that person. Contrarily, General Counsel and the Union contend that as a matter of fact and law the obligation to respond to an unconditional offer of return to work by unfair labor practice strikers reposed constantly and exclusively with the employer, and any failure to present oneself (other than where unjustifiably grounded) would not impair the reinstatement rights and backpay entitlement of such individuals. Under the latter contention, it is conceded and confirmed that the Union did, at least, undertake to assemble small five to seven member groups of employees, and cause them to appear at Respondent's place of business but this occurred only as a convenience

to the situation and as a natural outgrowth of the established collective bargaining relationship.

Chronologically yet beyond this, there are group and individual issues of the litigation which relate to circumstances such as absence from the labor market area, adequacy of the search for work in mitigation of damages offsetting expenses, post-strike termination, declining of employment in an overt of constructive sense, and an issue concerning whether James (Jim) Smith was physically capable of resuming his former employment at any time from late November 1977 until actually returning to duty on the basis of a medical release dated March 8, 1978.

Evidence

Misconduct Issues

a. Rodney Sittser

John ["Johnny"] Webb testified that

he had worked for Respondent since about 1973, and as of August 1977 was a night shift leadman on re-saws. He recalled that about a week before commencement of the strike he was "cornered" by three men while coming down a corridor towards the break room. The group, which included Rodney Sittser and Alonzo Hayre, ringed him against a wall, saying he would have to go on strike as recently ratified. Webb testified that he reminded them how he had been on vacation when the vote was taken, at which point they started shoving him with Sittser saying he should watch out because they might burn his house or garage or something.[7]

---

[7]Webb added that Sittser voiced all such threats to him on the telephone both before and after this occasion, in the course of "pursu[it]" that became "nerve-racking" over several months.

Don Clark testified that while an employee of Respondent during 1977 he was also personally acquainted with Sittser. He recalled that on the last weekend of July 1977 Sittser and his family visited Clark and his family at the latter's home. In the course of about 2-1/2 hours the two men talked, with Clark recalling that as they discussed the imminent strike and circumstances of certain employees dropping out of the Union, Sittser became progressively, visibly angrier. Clark testified that Sittser took the telephone and seemingly called Douglass to urge that the "Ochoco boys"[8] visit an employee named Cecil Barber in

---

[8]This term applied to several men who worked at Ochoco Lumber Company, a unionized mill in the Prineville vicinity. Individuals popularly believed to be described by this term, and the connotation of toughness that it carried, included Tom Harris and Tom Young who were president and vice president of the Union, respectively.

order to "Straighten him out." Clark recalled Sittser continuing with remarks that the hands of key knife grinding personnel should be broken. Clark testified that the experience with Sittser left him "edgy" to the point that he put his house up for sale in anticipation of looking elsewhere for work. Eventually this did not occur, and he remained on a production job with Respondent. Nothing untoward happened with respect to any of the allegedly threatened persons.

Helen Wright, a retiree from Respondent, testified that she knew Sittser in August 1977 as a co-worker of close functional proximity. She had resigned from the Union at around the start of the strike, and she recalled an occasion a few days after the strike started when while going home for her evening meal around 7:30 to 8:00 p.m.

Sittser had flagged down the car in which she was riding with her late husband. Wright testified that Sittser approached and agitatedly told her with much profanity that she was taking her life in her hands by crossing the picket line and would live to regret it. The experience frightened her to the extent of taking alternate routes on days following so as to avoid a repetition.

Sittser testified that he had started work with Respondent around 1974 and remained continuously until 1977, ending up as a cutter on the night shift. He recalled formerly being friendly with Clark, and once visiting him prior to the strike. Sittser testified that the possibility of a strike was discussed in general terms between them, with Clark becoming upset over other employees withdrawing from the Union. Sittser remembered how Clark

alluded to the many bad things that could happen in a strike, to which Sittser simply expressed a hope that no one get hurt. He also told Clark that individuals could be fined for crossing a picket line. Sittser denied making a call to Douglass, saying instead that he had telephoned only about child care matters, and that he had the "boys from Ochoco" remark passingly. Sittser categorically denied making any statement about the breaking of anyone's hands, and as to Wright denied ever stopping her car on a street or having any conversation of the type described. Sittser had no recall of ever telephoning to Webb in any context that would relate to the strike, or having any conversation with him generally and directly about supporting the strike. Further, he expressly denied ever threatening to burn any home, garage or

other building of Webb's. Hayre corroborated his denials.

b. Robert ("Andy") Anderson

Respondent's plant premises are depicted in an aerial photograph that was received into evidence as that party's Exhibit No. 5. [9] Orientation to this photo should be made by considering the left (longer) edge as the "bottom," with the main roadway at the front of the facility angling northeasterly from such bottom point of reference. The employee parking lot is thus in the lower center of the photo, and south from the structures. By combining the

---

[9] Identification by Respondent's counsel was made at Page 709 of the transcript, and the photo was received into evidence at Page 710. As actually appearing in the second folio of Respondent's documentary exhibits, it is inadvertently marked as "official Exhibit No. GC-4." This numbering is to be disregarded, and the document should correctly be considered Resp. Exh. No. 5 as intended and received.

graphics of the photo with uncontroversial testimony of record, it is seen that a row of landscaping extends southerly from the separate office building near the road, and a slight rise or berm is traversed by cars typically exiting the lot. At a point on the bottom of the photo, a more recognizable exit route leads past a stop sign.

Friday, August 5, 1977 was the ending date for the first full week of the strike. As this day and evening wore on, various rumors materialized concerning what was shaping up when the night shift would end at 1:00 a.m. (on Saturday, August 6, 1977). From the Union standpoint Douglass understood there would be "trouble" at 1:00 a.m., while molder set-up man Dan Close, and others, had heard there would be trouble stemming from the Union people having

clubs and dogs, plus an inordinant number of pickets compounded by extended consumption of alcoholic beverages. In this context the parties advanced their respective witnesses on the issue of what actually happened, and what role, if any, was played by Andy Anderson in a short but tumultuous span of time.

Respondent's first witness on the episode was Close.[10] He testified to leaving the plant at 1:00 a.m., quitting time, and seeing 40 to 50 pickets as he got in his car to leave work in company of his wife. There were several vehicles ahead of his, including that of Ron Reese, whose pick-up truck he saw being stopped by picketers and having its doors jerked open and its windows broken. Close testified that Andy

---

[10] It is to be remembered that activity transpired in full natural darkness, illuminated essentially by vehicle headlights and large industrial lights only one of which shines back into the parking lot.

Anderson was one of the persons opening doors and beating on the vehicle with a 2 ft. long club. Reese "floorboarded" his way through, and Close proceeded next as he was called names and had his own pick-up truck beaten on resulting in a dent behind the rear passenger window. Becoming nervous and frightened, he felt blocked by men ahead and at that point backed up hitting Andy Anderson.[11] Upon this happening Close exited in another direction and went to the town police station.

Night shift superintendent Jerry Payne testified that he observed employees leaving work when their shift of August 5, 1977 ended, at which time he estimated 30 to 40 pickets were in place. Payne saw Jerry Sherrer as the

---

[11] Close was unable to identify Andy Anderson as a person beating on his own vehicle.

first person out of the parking lot on a motorcycle, which was swung at with a club by some unidentified person. Payne believed that the next car in line was that of Steve Hardt, and seeing that definite trouble was brewing he hurried back inside the mill to call police. Upon re-emerging he saw the Ron Reese vehicle with "a bunch of people hanging on [it]" and the driver's side door open with others trying to get Reese out. Payne associated the person who had swung (or "waved") a club at Sherrer as the same person soon knocked to the ground, and from that circumstance identifiable as Andy Anderson. The club seen by Payne from "approximately 300 feet" away, was about 18 to 20 inches long and 2 or 3 inches around.

Jerry Sherrer testified that as he exited his motorcycle on the occasion, he swerved several to avoid a swinging

motion made by a person holding an object "like a policeman might carry."[12] Bryan Jones testified that upon leaving work he was in a car behind the trucks of both Reese and Close. He and his companion, Donny Powell, held back in the parking lot for awhile, and during this time he saw that the pickets, including a considerable increase in number from ones present at the 8:00 p.m. lunch break, were holding little league ball bats, tire irons and axe handles with which they were hitting on cars. Jones characterized the action as "tapping" and "screaming." He was close-by when Andy Anderson was knocked down, and when this happened Jones was near enough to the scene to hear Jim

---

[12] To the extent that Sherrer's testimony named Andy Anderson as the individual who swung the object, it is disregarded consistent with a granting of Union Counsel's motion to strike any name identification.

Smith say vengefully to Andy Anderson that he (Smith) was "going to kill the little son-of-a-bitch." Jones added that as all this commotion was occurring, Payne was urging everyone to "break it up" and get out of the parking lot. Vicki Duncan testified that she and her fiance' went to the plant at approximately 12:55 a.m. that night in order to see their friend Ron Reese. When the quitting whistle blew she saw Reese driving out, but suddenly several people were around his pick-up pulling the doors open and seemingly trying to get him out. She heard yelling and glass breaking in the dark and confusion, estimating that between 30 and 35 pickets were present. Steve Hardt testified that upon finishing his shift he attempted to drive through a picket line of approximately 40 persons, at which time Andy Anderson hit his car

with a club. He had not known Andy Anderson at the time but knew he was the same person as was soon hit by Close's truck. Hardt's wife was in the car at the time, and he described the damage from the club as being a 1/4 inch deep dent in the passenger side rain gutter.

Frambes, the first of Respondent's rebuttal witnesses on this issue, testified that late on the evening in question he had gone outside the office building and from its corner 150 feet away saw a vehicle approach near the stop sign area of the parking lot. Frambes recalled the four or five occupants of that particular car opening its trunk and pulling out clubs or ball bats which they passed along to pickets. After that he heard yelling and banging on cars, however, Frambes could not identify any person involved. Robert Anderson (coincidental name similarity

to Andy Anderson) was formerly a Prineville police officer and on duty the night of August 5-6, 1977. He was at the scene around 1:00 a.m. seeing rowdiness and intoxication. Respondent introduced its Exh. No. 8 through Robert Anderson, as being a photograph of an object picked up at the parking lot scene on the night in question and maintained thereafter as police property.[13] Rob Johnson testified that he was a night shift employee of Respondent in August 1977, and recalled the "ruckus." He estimated 50-60 pickets as being present when the shift ended, and testified to seeing Ron Reese nearly dragged from his pick-up truck as

---

[13]The 16 inch long object depicted in this exhibit is best described as an "Indian club", which is authoritatively illustrated and defined as a "metal and wooden club shaped like a large bottle, used singularly or in pairs for exercising the arms." The Random House Dictionary of the English Language (unabridged) 1979, page 724.

glass in it was broken. He remembered another car also being hit, and the driver, seemingly angered, slamming back into a man knocking him down. Johnson identified him as a person named Anderson, and the same individual as he had seen hitting on cars with a sort of "baton." Webb testified that as a night shift employee coming off work on August 5, 1977, he saw that the large group of strikers at the edge of the road had clubs, pipes and several dogs. When departing employees started out of the lot in their vehicles, Webb saw them beaten on in turn, and particularly recalled how the first rig had its windows broken out. After this he saw Close attempt to exit, and have his new pick-up truck hit with a club by a person who was later knocked down by Close. Tom Tucker testified that he, too, was a former second shift employee

of Respondent on the night of August 5, 1977, and had seen 30-40 people standing out along the road when the shift got off. They seemingly had the further exit blocked, causing drivers to start out closer to the plant. Tucker saw Reese's pick-up being damaged, and recalled that Andy Anderson was hitting rigs with some kind of a club or stick. Tucker identified "Ochoco" boys Harris and Young as being present along with Larry Stevens as part of the group closed around the Reese vehicle. Tucker testified that Andy Anderson hit Close's pick-up and was in turn knocked down when that driver "rolled back." Tucker was only a few feet away, and he testified that Andy Anderson looked up from where he was laying to say "I am going to kill you, you son-of-a-bitch." Tucker gave a challenging answer, but then others ran up including Tom Harris

who effectively told Andy Anderson to act unconscious like he was hurt.

General Counsel's first witness on this issue was James Hensley. He testified that most of the pickets late on August 5, 1977 were grouped at a center point adjacent to the parking lot. Hensley recalled that second shift employees emerged from the plant that night and seemed to be advancing on the pickets with clubs, conduit and brick mold taped to their hands. Momentarily he saw Reese's pick-up truck "screeching" to a halt, and when its doors flew open he heard a yell to watch out because Reese could have a gun. Hensley then saw an officer of the Union jump in and restrain Reese from reaching under his seat. Reese then backed crazily free, spinning his vehicle, throwing gravel and soon hitting a stop sign. Hensley denied that Andy Anderson had a

club at any time on the night in question. On the matter of whether any picket had a club, Hensley testified that he had not seen any. He termed the number of pickets as not exceeding 40, but in any event perhaps the largest assemblage up to that time. Jim Smith was a picket captain on the night of August 5, 1977. Smith was the person who yelled out that Reese had a gun as he saw the vehicle heading toward and scattering the pickets. He recalled how someone grabbed Reese's arm, that he broke loose and crazily backed away and into the stop sign. Smith denied that Andy Anderson was involved with Reese during these moments, and he administered to his friend when knocked down. Smith testified that about one-third of the emerging night shift employees had weapons such as pieces of wood casing or metal conduit, and that a "few more than

usual" number of pickets were present that night.

Douglass testified that he drove 6 or 7 Union members to the picket line, arriving about 12:55 a.m. and parking across the southerly exit road of the lot. His passengers included Tom Harris, Tom Young, Jerry Richardson (the Union's financial secretary and another Ochoco member employee), Andy Anderson, Jim Smith and possibly Larry Stephens. He soon saw an emerging pick-up being drive fairly fast and later "spitting up" dirt and gravel as it hit the stop sign after Harris had been on its running board. Douglass testified that to his knowledge none of the pickets or anybody transported in his car that night had weapons or clubs of any nature. Neither did he see any night shift employee carrying any weapon or instrument that could be [so] construed."

Alonzo Hayre testified that he was on the picket line that night and saw emerging employees holding clubs as they prepared to leave. He saw Close respond to being called a scab by "barrelling out," and then backing up abruptly causing Andy Anderson to be struck. Hayre denied that Andy Anderson had had a club at any time during the incident, and similarly denied that any pickets had any clubs or tire irons. Additionally, Hayre did not see or hear cars being ht, but did see a window of the Reese vehicle broken. Melvin Weger testified that he saw vehicles emerging from the parking lot, and that Close had reached the center of McKay Road without facing hindrance at the point that he backed through the picket line knocking Andy Anderson down. He had also observed the Reese vehicle, but saw no one atop it or that its doors were opened

(until after it hit the stop sign). Weger denied that a large car of the type drive by Douglass was pulled across the southerly parking lot exit as to block it. In terms of menancing objects, Weger saw no pickets with clubs or tire irons, and believed that even picket signs were cast down when "trouble first started."

General Counsel produced rebuttal testimony from Allen Dendy, who saw a few of the emerging employees with clubs but emphasized that picketers were mostly concerned with keeping clear of exiting vehicles. Dendy testified that Close had backed up recklessly without provocation, as Andy Anderson had not sported a club, picket sign, or any object in his hand during the incident. Larry Stephens testified that he did arrive in the Douglass car, and noticed Andy Anderson positioned at a more

northerly point. Stephens denied that Andy Anderson had anything in his hands, or that any "Ochoco" boy had come around him after he was struck and on the ground. Andy Anderson himself testified that he, too, arrived with Douglass, and soon saw night shift employees emerging belligerently. He testified to being approximately 25 feet away from the Reese vehicle as it came out, and that he was not carrying any sort of object.

Bruce Reed

As of July 1977 Bruce Reed was employed by Respondent under the supervision of Terry Turner, who headed the shipping and finish departments. Reed testified that he was prepared to go on strike starting Monday, August 1, 1977, yet on the previous Friday he was asked to work on Saturday (July 30, 1977). He agreed to do so, but in fact neither showed up nor called in. He commenced

picketing on a regular basis with other strikers on August 1, 1977, and eventually applied for reinstatement when the strike was over in November of that year. Further, he had gone into the company on Monday of strike commencement to pick up the pay check and was himself informed of having been terminated. Reed testified that he did not call in to advise he would not work on the pre-strike Saturday because he did not have a telephone and because he doubted that his immediate supervisor would be there to reach anyway. He conceded to knowing that he was "supposed to call in" under such circumstances.

Terry Turner testified that it was customary to terminate employees for failure to call in after having been scheduled for work, and in Reed's case, he personally prepared a "Report of Termination" dated July 30, 1977 with

that as a basis. Such action was routed through the personnel office, and Lockyear acknowledged it by entering his initial on the paper.[14]

Tim Chandler

The Backpay specification sets forth a claim for this individual from August 31, 1977 to July 10, 1978. He did not testify, and the General Counsel argues his case only tangentially in the post-hering brief where reference made to his "situation being of a similar general category" as others.

Respondent's Exh. No. 11 is a document purportedly bearing Tim Chandler's signature which acknowledges a "final termination check" and was endorsed by Lockyear on August 31, 1977 to the effect that a termination from

---

[14] Reed was reinstated around December 1977, and by March 31, 1978 had reached a point of job position and earnings rate that ended his claimed backpay period.

employment had been made because of "failure to call in as required by company rule." Lockyear also testified concerning Tim Chandler saying that this individual had worked during the strike and that business practice at the time was to solicit a signed slip from a person undergoing termination.

Kristie (Allison) Laudon

This individual commenced employment on August 2, 1977, immediately after the strike had begun. On September 12, 1977, she applied for membership in the Union, and thereafter picketed until the strike was over. She went in with others of a small group seeking reinstatement, and was eventually reinstated very early in 1978. Respondent introduced a "Report of Termination" dated on or about September 10, 1977 in the handwriting of supervisor J.E. Puckett. It recorded that Laudon

had been "fired" for not calling in on scheduled work days of Friday, September 9, and Saturday, September 10, (1977), adding the comment of her being a "poor worker." Laudon recalled that Puckett had been her foreman over the one month span of her employment, but she denied having been fired because of, or at the time of, signing up for the Union. She was uncertain whether she had reported for work on the dates noted, or whether she had called in to report any intentions.

Janice Grimm

This individual testified that she had participated in the strike from its inception, however, financial difficulties caused her to inquire of Lockyear about return to work after about a month. Her former job had been on the swing shift, and when Lockyear offered her an opening on "graveyard cleanup"

she declined. She subsequently received a letter dated October 10, 1977 which read:

> A JOB OPENING HAS DEVELOPED IN THE VINYL DEPARTMENT ON NIGHT SHIFT.
>
> AS THIS WAS YOUR DEPARTMENT AND SHIFT, YOU ARE BEING AFFORDED THE OPPORTUNITY TO FILL THAT VACANCY.
>
> ON SEPTEMBER 6, 1977, YOU EXPRESSED A DESIRE TO RETURN TO WORK. SEVERAL ATTEMPTS HAVE BEEN MADE BY TELEPHONE TO ADVISE YOU OF THE OPENING AND ALL HAVE BEEN UNSUCCESSFUL.
>
> THIS LETTER IS TO ADVISE YOU OF THE OPENING, AND TO LET YOU KNOW THAT THE VACANCY WILL BE FILLED IF YOU DO NOT RESPOND BY THURSDAY, OCTOBER 13, 1977.

Grimm testified that she did not respond to this communication, but later in October 1977 had a telephone conversation with Lockyear on the subject of retroactive backpay as had been received by others. He told her she was ineligible by reason of not being on the payroll after she had failed to respond to the letter and her position with the

company was terminated. Grimm continued picketing on a regular schedule until the strike ended, however, she did not apply with other Union members because of Lockyear's advice the month before.

Kearon Kinsey

This individual participated in the strike from inception onward, but recalled receiving written notice in October to return to work by a given date or have the job offered to another person. She did not respond to this letter, but about a week later, around early November, went to the company office and spoke with Lockyear and Frames in the personnel office. She told them of needing her job, and their response was that she would be telephoned if an opening arose. This did not happen, and when the strike ended she reappeared as part of a group. Lockyear told her that she had been

terminated because of not responding to the quoted letter.

Lockyear testified that Kinsey called in several times after going on strike wanting to resume work. He conferred with Stu Turner about her situation, and then wrote a letter dated October 11, 1977, which read:

> CONCERNING YOUR REQUEST FOR REINSTATEMENT, WE HAVE CONTACTED YOU SEVERAL TIMES REGARDING JOB OPENINGS, THE LAST TIME BEING TODAY 10-11-77.
>
> IF WE DO NOT HEAR SOMETHING POSITIVE FROM YOU BY 7:30 A.M. THURSDAY 10-13-77, WE WILL ASSUME THAT YOU HAVE FOUND SATISFACTORY EMPLOYMENT, AND ARE NOT INTERESTED IN RETURNING AT THIS TIME.

Stu Turner testified that he had made the decision to terminate Kinsey in November 1977, after she had been given a job at her request for which she failed to report for work or made any explanatory contact.

Wanda Freese

This individual testified that she had been a day shift employee in Respondent's finish department, and participated in the strike from its inception to its conclusion. She then routinely applied for reinstatement as were others, and recalled being interviewed by Lockyear. She told him in response to inquiry about availability, that she would accept any job except that "night work would be almost impossible" because she had children ages 15, 13, and 7 to care for at home. Freese testified that Lockyear was writing all the while, that he did not particularly respond to her remarks about not wanting night work, and that upon being thanked she left.

In January or February, 1978 Lockyear contacted her about a job opening on nights, however, she adhered to her point that it would be "really...

hard." She thus declined the offer, recalling that Lockyear seemed to understand her grounds and left the impression he would call again. In fact, Freese was fully reinstated in mid-April 1978.[15]

Jim Smith

This individual was one of the group applicants that appeared in conjunction with the strike being terminated. He testified that when he reported in, Lockyear had asked whether he was able to work, to which he answered affirmatively saying only that

---

[15]The backpay specification alleges April 25, 1978 as the date to which backpay is claimed for Freese. However, associated appendix S-2 states that Freese had been reinstated by "p/r/e/ 4-15-78," which I interpret to mean during a payroll period ending Saturday, April 15, 1978. Further, the appendix states that this reinstatement resulted in "her proper post-strike /hourly/rate" of $4.41. I note this ambiguity, and presume that the appendix controls.

a bruised knee was causing him to limp slightly. Arrangements were then made for examination by a company doctor, however, Smith recalls that the actual appointment did not materialize until March when the medical release was signed by Thomas L. Bristol, M.D. Smith testified that his injury had occurred while doing work in the woods, which he continued with there for a time. Further, he recalled having been previously seriously injured while an employee of Respondent in the past and without missing any work.

Smith had been on Employee Benefits Insurance (E.B.I./Workmen's Compensation) from December 13, 1977 to March 5, 1978. A physician's report on occupational injury by Dr. Bristol on October 31, 1977 had diagnosed bruised ligaments of the knee not preventing a return to regular employment, however, a later

examining physician, John P. Carroll, M.D., had summarized clinical findings with a recommendation of continued physical therapy, weight bearing only as tolerated and "probably no return to work for 3 to 4 weeks." Dr. Carroll's report was dated December 20, 1977.

James Hensley

This individual testified that he made routine application for reinstatement when the strike ended, but was not contacted until at least 3 weeks had passed. He then learned that Lockyear had been trying to reach him, and when he appeared at the company office along with employee Don Pemberton, Lockyear offered him a night shift job rather than one on days which he had previously worked. Hensley angrily declined, testifying that he left Lockyear's office but first saying his action should not be construed as a quit. He

has no contact since, and General Counsel contends that his backpay period continues to run.

Lockyear testified that he had conversed with Hensley in early January, and had a return to work offer angrily refused. Upon this Lockyear prepared a Report of Termination dated January 10, 1978 recording that Hensley had "quit" while remaining "very mad" at the company.

Carl Chancellor

This individual testified that he had engaged in the first 2 weeks of the strike and then looked for a job at The Dalles, Oregon, about 125 miles from Prineville. He maintained his principal residence in Prineville and frequently returned to the local area over the succeeding months. On two or three such occasions he saw Lockyear personally to inquire about the status of things and

chances of returning to work with Respondent. Additionally, he provided Lockyear with his temporary address at The Dalles. Carl Chancellor did not go in with the main groups of persons seeking prompt reinstatement after termination of the strike, however, he did contact Lockyear further during that general point in time on two separate occasions. He testified that Lockyear told him "that there wasn't any chance of me coming back to work." Carl Chancellor had on a least one occasion bitterly expressed to Faye Jordan and other Union members that he would never again take a job with Respondent, that he denied ever making such an utterance to anyone in management. Respondent never made a job offer to him and, as with Hensley, General Counsel contends that the backpay period continued to run.

Lockyear testified that he knew Carl Chancellor as an employee of the paint line. He recalled that prior to the end of the strike Chancellor had once come to him asking for his job back. Lockyear noted that in such instances over the August-November 1977 time span there were cases in which such individuals were returned to work and other cases in which they were not. On March 7, 1978, Lockyear endorsed Carl Chancellor's Employment Card with the notation "failed report to work after strike Nov. 28, 1978 (sic)." Lockyear testified that around that point in time of March 1978 Carl Chancellor had come into his office saying that he decided to stay with his job at The Dalles where he earned more money than with Respondent. Lockyear believed that was the last meeting of significance he ever had with Carl Chancellor.

Connie and Jerry Miller

These persons are husband and wife. Neither of them testified in the course of the hearing, and evidence concerning their employment status is confined to a certain personnel records assembled as Resp. Exh. 20. As to Connie Miller a report of termination initially dated "7-2-77" (presumably meaning August 2, 1977) was handwritten by a supervisor. In the portion contemplating a "Reason For Termination" the following was entered:

> Connie would not cross the picket line, sent word in she wanted to quit (by Phone).

A second document purporting to be a handwritten note to the file states:

> Miller's phone has been disconnected, I could not get ahold of Connie.
>
> If she calls in, maybe she will come down and sign this termination.

A final document relating to Connie Miller is an Employment Card showing "Termination Date" of August 10, 1977 with notation, "would not cross picket line, sent word by phone she wanted to quit." The sole document in evidence concerning her husband Jerry Miller is another Employment Card showing his termination date as August 10, 1977 with the notation "joining Police Dept." It was stipulated between the parties that in fact Jerry Miller never joined a police department after commencement of the strike.

Dean Churchill

This individual testified that he first worked for Respondent in the summer of 1976 on a part-time summer basis. He then commenced student status at Central Oregon Community College (C.O.C.C.) as a biology major. In the summer of 1977 he applied for a full-

time job and was working the night shift in that status when the strike commenced. When the college semester at C.O.C.C. began in Fall 1977 Churchill enrolled for 10 credit hours, indicating in his testimony that this was not "a real high credit load" but was what he had elected to do "Because I didn't have anything better to do." Churchill testified that when the strike was over he went to a Union meeting and was told that persons would be sent back to small groups. Late that same afternoon he was in a group which went to the company office where he talked with a person who he cannot now recall or identify. He did describe his appearance as being in a reception room, and that the group he was with comprised four to five individuals. He recalled being told at the time that he would be called back, but had no further contact with Respondent

until applying for work sometime during 1978.

Frambes testified that he had contacted Churchill by telephone in early 1978 to offer an available job. He recalled Churchill telling him of not being available for work because he was either attending school at the time or on the verge of going back to school. Frambes later completed a Report of Termination on Churchill dated January 31, 1978 indicating he was terminated on the following basis:

> When called to work from strike, he said he was back in college and not interested in working at this time . . .

Richard Zimmerman

This individual testified that he went out on strike with the other employees on August 1, 1977, but by the time it ended he was working in Corvallis, Oregon. As of late November

1977 his family was still in the Prineville area, and in connection with a short visit home from his six-day work schedule in "the valley" Zimmerman learned that Union members were starting to go back for their jobs. Zimmerman testified that he went to the company office and found "a bunch of people there" waiting for interviews. Being pressed for time in terms of traveling the approximately 140 miles to reach his workplace in Corvallis, Zimmerman spoke hurriedly with a receptionist, telling her that he was able to resume work at any time and leaving both his then-current local and valley address. He saw the receptionist write the addresses down, however, he does not know her name nor can he now make any physical description after the passage of years. Zimmerman testified that about a month after this episode, he received a letter

from Respondent and a check for around $100 in "back wages." A job offer was never made to Zimmerman, and General Counsel again contends that his backpay period continues to run.

Search For Work/Interim Earnings

As among the several dozen claimants, there is considerable diversity with respect to their efforts at, and success in, obtaining interim employment from and after termination of the strike. Part of this diversity systems from instances in which employment was secured prior to such termination in late November 1977, while another main part stems from differing perceptions and/or motivations with respect to seeking work of any nature following the group interviews of reinstatement applicants, all in the context of the 1977-78 winter job market in central

Oregon as complicated further by imminence of the year-end holiday season.

In this general sense there are certain principles which apply. An employer may mitigate backpay liability by showing that a claimant "willfully incurred" loss by "clearly unjustifiable refusal to take desirable new employment." Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 199-200 (1941). This is an affirmative defense, with a burden on the employer to prove necessary facts. N.L.R.B. v. Mooney Aircraft, Inc., 366 F.2d 809, 813-14 (5th Cir. 1966). An employer does not meet that burden by presenting evidence of lack of employee success in obtaining interim employment, or that low interim earnings resulted. Rather, the employer must affirmatively demonstrate that the employee "neglected to make reasonable efforts to find interim work." N.L.R.B. v. Miami

Coca-Cola Bottling Company, 360 F.2d 569, 576 (5th Cir. 1966). Furthermore, while a discriminatee must make "reasonable exertions" to mitigate his loss of income, he is not held to "the highest standard of diligence." N.L.R.B. v. Arduini Manufacturing Corporation, 394 F.2d 420 (1st Cir. 1968). Success is not the measure of sufficiency when discriminatees seek to achieve interim earnings; the law "only requires an honest good faith effort." N.L.R.B. v. Cashman Auto Co., 223 F.2d 832, 836 (1st Cir. 1955). Indetermining reasonableness of this effort, the employee's skills and qualifications, his age and labor conditions of the area are factors to be considered. Mastro Plastics Corporation, Etc., 136 NLRB 1342, 1359. In determining whether an individual claimant has made a reasonable search, the test must be whether

the record as a whole establishes that the employee had efficaciously sought other employment during the entire backpay period. Saginaw Aggregates, Inc, 198 NLRB 598; Nickey Chevrolet Sales, Inc., 195 NLRB 395, 398-99. Finally, it is also well established that any uncertainty in the evidence is to be resolved against a Respondent as wrong doer. Miami Coca-Cola Bottling, supra; Southern Household Products, 203 NLRB 881.

Here some individuals found and maintained jobs in distant parts of the state, while others worked regularly in the Prineville vicinity with various manufacturing, retailing, service or miscellaneous employers of the area. The subject was illuminated by Arthur Bigelow, former office supervisor for the Oregon State Employment Service at Prineville from 1975 until mid-1978.

Bigelow characterized employment opportunity in the lumber processing industry during the 1977-78 winter as one of the "better years," without the usual "down drop that we normally had" but instead remaining "fairly steady."

He recalled the receipt of requisitions for job applicants from "various mills," including American Forest Products Company (formerly "Bendix" and "Coin") and, surprisingly, even Consolidated Pine. Bigelow remembered the unemployment rate at the time as being around the "normal" 5-6%, and he contrasted that with a current 12 to 15%. Testimony on the job market profile was also offered by Ray Gould, an individual of many years experience in the wood products industry and now employed by American Forest Products. His examination of hiring records for that firm showed that 71 persons were hired over

the 3-month period of November 1977-January 1978 (18-18-35), inclusive. Gould testified that these hirings were into "plant jobs," However, he had no specifics as to their wage rates and job categories, or as to which operational function needed such staffing.[16]

Art Fitzgerald, resident manager of American Forest Products in 1977 and currently, testified that the Winter of 1977-78 hirings were a reflection of different reasons, including "business conditions pick[ing] up."[17]

---

[16] Respondent reserved the right to recall Gould at a point in the hearing when he would be better equipped with documents and clarification, however, this right was not later exercised.

[17] Gould had testified on July 15, 1982, while Fitzgerald testified during resumption of hearing on August 20, 1982. Respondent did not announce that Fritzgerald was intended to enlarge on Gould's testimony, but to the extent this occurred the failure to recall Gould becomes all the more understandable and I draw no inference

(Footnote Continued)

Lenny Lyle, vice-president of administration for Les Schwab warehouse center in Prineville, testified that he has been with this retread tire production and distribution company for 12 years. In the span November 1977-January 1978 this firm hired 7 non-office employees for entry level positions in either the retread plant or the distribution center.

Ellsworth Wright, general manager of Bend Millworks Company, testified that his firm is another direct competitor of Respondent and utilizes practically identical equipment. In early 1978 Bend Millworks reached a total compliment of over 600 employees, which represented

(Footnote Continued)
adverse to Respondent because of this configuration. A composite of their testimony establishes that American Forest Products is a direct competitor of Respondent, is located close by, and exhibits great operational similarity including equipment used and products manufactured.

the early operational phase of "a very good year." The plant is at the north end of Bend, and estimated 45 minute drive from Prineville. Wright estimated that over a time span of November 1977 into part of February 1978, Bend Millworks was hiring at a rate of 30 to 60 employees per month. He tended to believe that this influx would include both skilled and unskilled persons. As Gould has done, Wright testified that these would be no impediment to a qualified person being hired for an active job opening simply because of being, or recently having been, on strike such as was the case at Clear Pine.

Against this background, Respondent contends generally that there has been a pervasive failure to mitigate damages by claimants, and that interim earnings were available to those not willfully

idling themselves from employment. Respondent attacks the implication of futility and needlessness as associating with testimony of some discriminatees,[18] by naming Colleen Maw, William R. Carter, Art Morton, Jordan, Debbie Miller and Hyre as persons possessed of no anticipation that they would immediately return following the strike. Respondent also points to the great number of individuals who simply registered for, and usually received, unemployment compensation benefits, but concededly engaged in no search for work or did so only with desultory effort.

---

[18] General Counsel argues exactly to the contrary, asserting in his brief that involved employees "realistically thought" they would resume working soon after ending their strike, and that in any event a "discouraged" outlook was "understandable."

Credibility

As a component of this litigation, the resolution of credibility arises only spottily in particular instances of whether the employment relationship survived some particular episode or sequence, plus the massive diversity of testimony respecting the eventful night of August 5, 1977 and the issue concerning any verbal threats of which Sittser is accused.

In general, I am satisfied that Respondent's personnel records have a homespun integrity sufficient to give them ordinary weight. This, in turn, affects those issues as to which such records tend to corroborate to claimed experiences and actions of Stu Turner, Lockyear and Frambes.

I cannot credit Kearon Kinsey, whose testimony was hesitant, vague and

unpersuasive. On this issue I credit Lockyear, whose demeanor and detail of recall respecting Kinsey was convincing. Further, I find Stu Turner creditable in this instance, particularly when tying in his recollection with the fact that Kinsey's husband was a valued employee at the plant.

I credit Hensley over Lockyear in terms of any disparity that exists between their respective versions of his post-strike interview concerning employment. Similarly, I credit Carl Chancellor over Lockyear on the point of this claimant maintained an interest in returning to work, about which Respondent did know or should have known. In these two instances Respondent's documentary evidence to the contrary is rejected as erroneous recordation by Lockyear.

I credit Frambes in regard to his recollection that he extended a job offer to Churchill around January 1978, and that it was declined. There is another element to the backpay eligibility issue regarding Churchill, and it will be treated in the resolution below.

I credit the sincere-seeming Freese and Zimmerman with respect to their respective contacts about resuming work. In the scheme of things the recollections were contradicted by implication, however, I am satisfied that they have each conscientiously set forth accurate facts.

As to the situation of Sittser's claimed misconduct, I credit Respondent's witnesses Clark, Wright and Webb on demeanor grounds. Sittser was himself evasive and unconvincing in his denials of what was attributed to him, and this frailty surfaced in yet other

areas of his overall backpay claim. To the extent that Hayre supported Sittser's version, I reject that testimony also.

As to events at and around 1 a.m. of Saturday, August 6, 1977, immediately following the night shift having completed its work, I give primacy credence to the testimony of Close, Payne, Sherrer, Jones, Hardt, former police officer, Robert Anderson, Johnson, Webb and Tucker. The critical fact emerging from this array of witnesses is that Andy Anderson carried an object like a wooden Indian club to the hectic confrontation, and used it to hammer on passing vehicles until knocked to the ground by Close's reversing maneuver. I believe this interpretation harmonizes with all probabilities of the situation, particularly when intriguing testimony of Hayre is read in connection with that

of Douglass. The former quite openly described key individuals associated with the picket line as apparently inebriated, while the latter all but conceded how "in effect" his large automobile had blocked off normal egress from the plant parking lot. This translates into an inference that Anderson, as part of these dynamics, went to the scene equipped and ready to engage in pugnacious behavior.

Findings of Fact and Resultant
Resultant Conclusions of Law

On the individual eligibility issues I hold as follows:

1. Bruce Reed cannot be considered validly terminated prior to acquiring status as an unfair labor practice striker. That was his plain intention, and the intervening circumstance of an overtime assignment should not be available to this employer in frustration of that object.

2. Respondent's documentary evidence concerning Tim Chandler is sufficient to demonstrate that he was routinely terminated after a spell of working with the strike in progress.

3. Respondent's documentary evidence concerning Kristie Laudon is suf-

ficient to demonstrate that she had similarly been routinely terminated after being hired with the strike in progress.

4. Respondent's documentary evidence concerning Janice Grimm is sufficient to demonstrate that she displayed such equivocation toward employment with Respondent in late 1977 that she either abandoned the strike, or failed to give notification of any interest in reinstatement which, in her particular case, was a pre-requisite to backpay entitlement.

5. Respondent's documentary evidence concerning Kearon Kinsey is sufficient to demonstrate that she abandoned the strike and was validly

terminated with finality effective October 13, 1977.

6. Wanda Freese did not waive any entitlement to reinstatement, nor did she fail to accept an appropriate job offer at any time prior to the end of her backpay period.

7. The medical evidence respecting Jim Smith is somewhat inconclusive, however, the express entry by Dr. Carroll to the effect that Smith should not return to his regular work until well into January 1978 is sufficient to justify Respondent's delaying reinstatement here. This serves to overcome Smith's opinion of self-capability and other subjective evidence that would show an earlier ability to work. However, Respondent's overall delay

into March 1978 was not adequately explained, and for this reason I hold that Smith is entitled to 1/2 of the amount calculated for the first quarter of 1978, or the reasonable net backpay figure of $2,682.

8. The fundamental issue of how the mechanism of effectuating employee return to work following the strike is one on which I hold for the claimants. The Union's notification of strike termination and desire for reinstatement was resoundingly unconditional. The testimony of Regional Counsel No. 3, Vice President, John Kocker, shows convincingly that such was the intent and purpose of striking Union members, and no authority reposed outside this crew for any variance.

Stu Turner's responsive letter did not shift the burden of notifying employees to the Union, and attorney Newcomb's testimony does not yield this result, particularly when he concedes that no contrary agreement was reached in any binding sense. The Union's participation in sending up groups of employees for registration and company follow-up was a mere accommodation to the situation and its own desire to see members promptly working again. See J.H. Rutter-Rex Manufacturing Co., Inc., 158 NLRB 1414.

9. Respondent failed to meet its duty of extending a valid offer of reinstatement to James Hensley.

10. Respondent failed to meet its duty of extending a valid offer of reinstatement to Carl Chancellor.

11. Respondent's documentary evidence concerning Connie and Jerry Miller is sufficient to demonstrate that they did not engage in the strike and each abandoned their employment immediately thereupon.

12. Dean Churchill was not shown by convincing proof to have attained striker status, and, alternatively, declined a valid, timely offer of re-employment. Because of this he is removed from any backpay entitlement.

13. Respondent failed to meet its duty of extending a valid offer of reinstatement to Richard Zimmerman.

14. Rodney Sittser made verbal threats of injury or adversity to several individuals, however, these were

unaccompanied by action and did not recur over the several following months in which the strike continued. Respondent has over reacted and and is woefully without justification in contending that Sittser engaged in disqualifying misconduct. His backpay claim is confirmed, except for a reduction of $4,000, calculated as constructive intra-family interim earnings of $500 per month for the 8 months of January-January-August 1981, inclusive. See Midwest Solvents, Inc. v. N.L.R.B., 112 LRRM 2276, ___ F.2d ___ (Tenth Cir. 1982).

15. Andy Anderson engaged in picket line misconduct by tapping on exiting vehicles with an ominous, club-like object, and generally menaced non-non-striking employees in the

several moments of a single fractious confrontation. This is the "animal exhuberance" which the Board excuses, and I again conclude that Respondent has baselessly seized on limited happenings in a fruitless effort to escape major monetary liability. I confirm the backpay claim of Anderson. See Coronet Casuals, Inc., 207 NLRB 304.

16. As a matter of law Respondent has not convincingly shown that any employee failed to mitigate damages by their conduct following the strike. The situation allowed a reasonable belief that reinstatement could occur any day, and the testimony of management officials from other wood products firms in the area, and from State func-

tionary Bigelow, does not establish jobs readily available to these claimants. There is no correlation between number of applicants and hires actually processed, and the wide diversity between those who achieved interim earnings and those who hopefully waited is the exact illustration of human variances contemplated in the Phelps Dodge line of cases. I also expressly find that Don Pemberton's temporary presence in California during an early part of the backpay period was not a disqualifying removal from labor market prospects.

17. The only evidence with respect to financial loss stemming from the unilaterally substituted health care plan is testimony by Lauren Kelhoyoma to the effect that he has

been "getting stuck" with annual deductibles of up to $200 under the new plan. Respondent introduced a letter of Aetna account executive John Bayless dated June 23, 1981 stating that the substitute contract was a "duplicate plan of benefits." Kelhoyoma himself termed benefits of the old plan "more or less" paying off, and I cannot accept that General Counsel has seriously pressed this branch of the litigation. Given the enormous complexity of industrial health care plans, the meager evidence on the point is insufficient as a basis for any finding of liability running to Respondent.

RECOMMENDED SUPPLEMENTAL ORDER[19]

Respondent, its officers, agents, successors, and assigns, shall pay to each discriminatee the sum set opposite his or her name on the attached net backpay recapitulation market "Appendix," together with interest as set forth in Isis Plumbing & Heating Co., 138 NLRB 716, and Florida Steel Cor-

---

[19] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed wavied for all purposes.

poration, 231 NLRB 651.[20] Individual amounts to persons for whom no valid offer of reinstatement has yet been made are subject to adjustment based on projections from and after August 31, 1981.

Dated: March 9, 1983

DAVID G. HEILBRUN
Administrative Law Judge

---

[20]Dendy's sum is reduced by the conceded amount of $200, which Darlene Forsyth's is reduced by $187 for a medical expense item incurred outside her backpay period. Sums listed for Juanita Burr, David Fuller, Kenneth Heitz, Eunice Rice and Larry Chancellor shall be transmitted to the Regional Director for Region 19, to be held in escrow of one year with disbursal or return as appropriate.

Robert Anderson	$ 35,900.00
Beverly Bishop	2,548.00
Juanita Burr	1,212.00
William Carter	1,467.00
Roy Chambers	1,175.00
Larry Chancellor	69.00
Oliver Chandler	1,409.00
Allen Dendy	1,158.00
David Dunn	1,263.00
Raymond Dunn	1,207.00
Donna Winget	1,069.00
Charlotte Evans	1,702.00
Thomas Ferguson	1,563.00
Darlene Forseth	1,078.00
Wanda Freese	3,062.00
David Fuller	1,033.00
Alonzo Hayre	1,515.00
Kenneth Heitz	923.00
Michael Hensley	1,662.00
Maximiano Hernandez	1,506.00
Douglas Holt	1,181.00
Laura Jones	834.00
Audrie Jordan	1,033.00
Lauren Kelhoyoma	1,128.00
Daniel Kinnear	559.00
Peter Koutsouris	1,703.00
Winnie Koutsouris	1,394.00
Colleen Maw	1,224.00
Henry McLamb	1,114.00
Douglas Menges	1,823.00
Donald Meritt	1,504.00
Debbie Miller	1,776.00
Janice Miller	1,308.00
Arthur Morton	1,017.00
Mary McKinney	792.00
Rose Mary Nelson	1,755.00
Don Pemberton	1,099.00
Rodney Prewitt	1,703.00
Karen Pryer	1,304.00
Bruce Reed	907.00
Eunice Rice	837.00
Sandra [illegible]	996.00

Larry Sheffield	457.00
Rodney Sittser	23,602.00
Jim Smith	2,682.00
Maxine Jones	2,992.00
Lisa Gonser	1,421.00
Lucille Streetman	972.00
Thomas Tugman	2,969.00
Marvin Weger	1,023.00
Melvin Weger	1,623.00
Richard Whittenburg	1,281.00
Jean Williams	1,538.00
Daniel York	1,188.00
James Hensley	6,066.00
Richard Zimmerman	1,033.00
Carl Chancellor	7,085.00
Grand Total	$145,386.00

APPENDIX D

Nos. 84-7196/7311
NLRB #36-CA-3129

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLEAR PINE MOULDINGS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

International Woodworkers of America,
Local 3-200,
Intervenor,

FILED
JULY 10, 1985
PHILLIP B. WINBERRY, Clerk

ORDER

Before: GOODWIN, SCHROEDER and BEEZER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

Nos. 84-7196/7311

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLEAR PINE MOULDINGS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL WOODWORKERS OF AMERICA,
LOCAL No. 3-200, AFL-CIO,
Intervenor,

MOTION TO REMAND CASE TO
THE NATIONAL LABOR RELATIONS BOARD

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT:

The National Labor Relations Board, by its Deputy Associate General Counsel, respectfully moves this Court to remand the above-captioned case to the Board and shows as follows:

1. On March 26, 1984, the Company filed its petition to review the Board's supplemental order in the instant case awarding certain backpay amounts to certain employees. On May 1, 1984, the Board filed its cross-application for enforcement against the Company and filed the certified record.

2. The Board wishes to reconsider certain issues raised regarding the amounts of backpay due under the Board's order.

3. Board reconsideration prior to judicial review would conserve judicial, private, and administrative resources.

4. The instant case presented issues regarding striker misconduct as well as backpay when the case was before the Board. The Board resolved the striker misconduct issues in favor of the Company and adversely to the Union. The Union filed and then withdrew a

petition challenging the Board's resolution of the striker misconduct issues. The Board now seeks reconsideration solely to address backpay issues; it does not intend to reconsider any striker misconduct issues.

5. Counsel for the Company does not oppose the requested remand; counsel for the Union has been advised of this motion and has not stated a position on the motion to Board counsel.

WHEREFORE, the Board requests that the case be remanded to the Board for reconsideration.

Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C. this 27th day of July, 1984.

I hereby certify that I served the foregoing .....

..... on ....., attorney for ..... on the ..... day of ....., 19....., by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in a sealed envelope addressed to the said attorney at .....

.....

which is his regular office address, or his address as last given by him on a document which he has filed in the within entitled cause and served on me; said sealed envelope was then deposited in the United States post office at .....

....., Oregon, on the day last above mentioned, with the postage thereon fully paid.

.....

Attorney..... for

Service of the within .....

is hereby accepted in ..... ,Oregon, this ..... day of ..... 19.....,

by receiving three copies thereof.

.....

Attorney..... for .....

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
DEC 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-720

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CLEAR PINE MOULDINGS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL WOODWORKERS OF AMERICA,
LOCAL NO. 3-200, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION OF INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL NO. 3-200, AFL-CIO

LYNN-MARIE CRIDER
25 Cornell Avenue
Gladstone, OR 97027
(503) 656-1475

Counsel of Record
for Respondent
International Woodworkers
of America, Local 3-200

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

15pp

QUESTIONS PRESENTED

1. Must a court, on cross-applications for review and for enforcement of an order of the National Labor Relations Board, deny enforcement of a Board order insofar as it is repudiated by the Board while the enforcement proceeding is pending?

2. Did the Board exceed its remedial discretion when it awarded back pay to unlawfully unreinstated unfair labor practice strikers who registered with the state employment service but made no other effort to find interim employment for periods varying from one to two months?

3. Did the Board err in awarding back pay to individuals who did not testify at a back pay proceeding although the employer did not plead the affirmative defense of willful loss of earnings?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
INDEX OF AUTHORITIES	iv
OPINIONS BELOW	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
I. The Court of Appeals applied well established principles in enforcing the award as to registrants for work	7
II. No court of appeals has required the Board's General Counsel to produce all claimants as a condition to award of back pay	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases Page

Clear Pine Mouldings, Inc., 632 F.2d 721 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981) 3
Clear Pine Mouldings, Inc., 238 N.L.R.B. 69 (1978) 2
N.L.R.B. v. Mastro Plastics Corp., 354 F.2d 170 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966) 10, 11
N.L.R.B. v. Mercy Peninsula Ambulance Service, Inc., 589 F.2d 1014 (9th Cir. 1979) 8
N.L.R.B. v. Nickey Chevrolet Sales, Inc., 493 F.2d 103 (7th Cir.), *cert. denied*, 419 U.S. 834 (1974) .. 8
N.L.R.B. v. Rice Lake Creamery Co., 365 F.2d 888 (D.C. Cir. 1966) 10
Phelps-Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1941) 7, 8
Saginaw Aggregates, Inc. v. N.L.R.B., 482 F.2d 946 (6th Cir. 1973) 8
Southland Manufacturing Corp. v. N.L.R.B., 475 F.2d 414 (D.C. Cir.), *cert. denied*, 414 U.S. 858 (1973) 11

Statutes

National Labor Relations Act § 10(c) 7
29 U.S.C. § 160(d) 9
29 U.S.C. § 160(e) 9
29 U.S.C. § 160(f) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-720

CLEAR PINE MOULDINGS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL WOODWORKERS OF AMERICA,
LOCAL NO. 3-200, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION OF INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL NO. 3-200, AFL-CIO

International Woodworkers of America, Local No. 3-200, AFL-CIO [1] respectfully requests that the Court deny the Petition for Writ of Certiorari. I.W.A., Local No. 3-

[1] International Woodworkers of America, Local No. 3-200 is referred to herein as I.W.A., Local No. 3-200 or as the Union.

200 was the charging party before the National Labor Relations Board and intervened in the review proceeding before the Court of Appeals. The Union is therefore a party by virtue of Rule 10.4 of this Court.

OPINIONS BELOW

The decision and order of the National Labor Relations Board is reported at *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044 (1984). The memorandum opinion of the Court of Appeals for the Ninth Circuit has not been reported by order of the court. It is reproduced in Appendix A to the Petition.

STATEMENT OF THE CASE

The agency order challenged by Petitioner issued, after hearing, when the N.L.R.B. and Clear Pine were unable to agree on the amount of back pay due unfair labor practice strikers who had been unlawfully denied immediate reinstatement when they offered to return to work.

The Union had terminated a three-month strike and unconditionally offered, on behalf of Clear Pine employees, to return to work on November 28, 1977. The Company had not immediately reinstated them. Most, however, had been reinstated between December 31, 1977 and March 31, 1978.[2]

On September 12, 1978, the Board issued a decision and order finding that the Company had committed various unfair labor practices which had caused the employees to engage in the 1977 strike and that the employees were unfair labor practice strikers. *Clear Pine Mouldings, Inc.*, 238 N.L.R.B. 69, 77-80 (1978). The Board's order required the Company to offer immediate and full reinstatement to the strikers and to make them whole for losses caused by the Company's failure to reinstate them. *Id.*, 238 N.L.R.B. at 81. The Court of Appeals enforced the

[2] Appendix A to the Petition at 2a.

Board's order and this Court denied certiorari. *Clear Pine Mouldings, Inc. v. N.L.R.B.*, 632 F.2d 721 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981).

Clear Pine and the Regional Director of the N.L.R.B. were unable to agree on the amount of back pay due. Accordingly, on August 31, 1981, the Regional Director issued a back pay specification detailing his computation of back pay and interim earnings for each striker for each calendar quarter until he was reinstated to his former job. GCX 1(c), appendix A-PPP.[3] The Company filed an answer generally denying that any back pay was due. GCX 1(e). On December 4, 1981 the Company filed an amended answer again generally denying any liability but also stating facts and articulating defenses with respect to certain strikers. The Company did not allege that any employee failed to seek interim employment or otherwise suffered a willful loss of earnings. GCX 1(i). On January 14, 1982, the Regional Director issued an amended back pay specification. GCX 1(j). The Company's answer to the amended specification again failed to raise a defense of willful loss of earnings. GCX 1(l).

With the pleadings in that condition, the back pay hearing opened July 13, 1982 before an administrative law judge. At no time during the hearing did counsel for Clear Pine ask leave to amend his pleadings to allege willful loss of earnings, request the assistance of counsel for the General Counsel of the N.L.R.B. in locating back pay claimants or claim that counsel had failed to cooperate with him in that regard. On the second day of the

---

[3] References, except to the orders of the N.L.R.B. and the court below which are reproduced in the Appendixes to the Petition, are to the Record before the Court of Appeals. "Tr." refers to the stenographic transcript of the supplemental hearing before the administrative law judge. "GCX", "RX" and "UX" refer to exhibits introduced at the hearing by the General Counsel, the Company and the Union respectively.

hearing, however, he indicated he "would like" to amend to allege that claimants were willfully idle but that, "I would have to say that as to certain of the claimants that would not be true." Tr. 347-348. He never, prior to briefing, identified the claimants he contended had been willfully idle.

Notwithstanding his failure to plead, counsel for the Company asked certain of the General Counsel's witnesses questions concerning their efforts to seek interim employment and called a number of claimants, himself, to answer questions on that subject. Fourteen of the claimants who testified stated that they sought interim work by registering at the state employment agency but made no further effort to find work. Each of those employees returned to work at Clear Pine within two months of the end of the strike (November 28, 1977), most during the week following New Year's Day.[4]

Twenty-seven claimants did not testify at the hearing. Counsel for the General Counsel informed the administrative law judge that five of those were unavailable to testify. The remaining claimants, while available, were called by none of the parties.

---

[4] Alonzo Hare returned Jan. 3 or 4, 1978 (GCX 1(e) at 3-4, GCX 1(c), V-2); Thomas Tugman returned Jan. 4, 1978 (GCX 1(e) at 3-4, GCX 1(C), GGG-2); Faye Jordan returned Jan. 4, 1978 (GCX 1(e) at 3-4, GCX 1(c), CC-2, Tr. 364); Daniel York returned Jan. 4 or 6, 1978 (GCX 1(e) at 3-4, GCX 1(c), MMM-2 Tr. 356); Winnie Koutsouris returned Jan. 5 or 6, 1978 (GCX 1(e) at 3-4, GCX 1(c), HH-2, Tr. 497); Colleen Maw returned Jan. 5 or 6, 1978 (GCX 1(e) at 3-4, GCX 1(c), JJ-2, Tr. 497); Art Morton returned Jan. 5, 1978 (GCX 1(e) at 3-4); Darlene Forseth returned Jan. 5, 1978 (GCX 1(e) at 3-4, Tr. 804); William R. Carter returned Jan. 5, 1978 (GCX 1(e) at 3-4, GCX 1(c), E-1); Peter Koutsouris returned Jan. 6, 1978 (GCX 1(e) at 3-4); Allen Dendy returned Jan. 10, 1978 (GCX 1(e) at 3-4); Tom Ferguson returned Jan. 17 or 22, 1978 (GCX 1(e) at 3-4, Tr. 913); David Dunn returned Jan. 17, 1978 (GCX 1(e) at 3-4); Debbie Miller returned Jan. 26, 1978 (GCX 1(e) at 3-4, GCX 2(c), 00-2).

The Company presented general evidence that substantial hiring was done by area wood products employers during the back pay period. There was no evidence that any of the 27 non-testifying claimants was offered employment but refused it. The Company contended, based on this general testimony and the lack of substantial interim earnings, that the Board should conclude that those who failed to testify willfully lost earnings and should be denied back pay.[5]

The Board, adopting the recommendation of its administrative law judge, held that the Company had failed to establish that any claimant had incurred a willful loss of earnings. Nevertheless, the Board ordered that the gross back pay due the five claimants who were unavailable to testify should be held in escrow until such time as they could be located and the Company given an opportunity to question them.[6] The order issued February 22, 1984.

The Employer petitioned for review of the order to the Court of Appeals for the Ninth Circuit. The Board cross-petitioned for enforcement and filed the Record.

Three months thereafter the Board moved the Court to remand to "reconsider certain issues raised regarding the amounts of backpay due under the Board's order." When the Union opposed the remand request, the Board clarified that it "wishes to reconsider only that portion of its decision which addresses the adequacy of certain discriminatees' efforts to mitigate backpay by seeking interim employment." The Board at no time indicated that it intended to reopen the hearing. Rather, it simply wished to reassess the evidence on the existing record. The motion was denied.

The Board in its brief and at oral argument persevered in its remand request but, alternatively, sought enforcement of its order except insofar as back pay was awarded

---

[5] Appendix C to Petition at 126a.

[6] Appendix C to Petition at 144a.

the fourteen who testified that their efforts to mitigate back pay consisted solely of registration for work.

The Court of Appeals denied the remand request saying, "The record as developed is sufficient for a back pay determination and the Board's decision adequately resolved the issues presented to it." [7] It enforced the N.L.R.B. order, finding that Clear Pine had not carried its burden to prove failure to mitigate. The Court held, with respect to the 14 whose efforts to mitigate were limited to registering for work,

> "The Board found that the employees were returning to work rapidly and each of them could have reasonably expected to be back at Clear Pine on short notice. The Board in the past has also permitted victims of unfair labor practices an adjustment period roughly equal in duration to the period here. * * * The employees did not need to make, under the circumstances, a more diligent search for work." [8]

The court also rejected Clear Pine's contention that a claimant cannot be awarded back pay if he has not testified, holding that the employer carries the burden not only of proof but also of production of witnesses unless the employer makes a "specific demand before the A.L.J. hearing." [9]

The Court of Appeals denied a Petition for Rehearing and Suggestion for Rehearing en banc.

REASONS FOR DENYING THE WRIT

The Employer petitions this Court to absolve it of back pay liability to 41 employees to whom it discriminatorily denied reinstatement. The Employer wishes to be freed

---

[7] Appendix A to the Petition at 5a.

[8] Appendix A to the Petition at 6a-7a.

[9] Appendix A to the Petition at 7a.

of this liability to 27 of the employees because counsel for the General Counsel of the National Labor Relations Board did not call the employees for questioning concerning their efforts to find interim work. Yet the General Counsel did not call them because the Employer failed to put the parties on notice of its intent to raise the defense of failure to mitigate by pleading it. The Employer seeks to paper over this defect in his case by proposing a novel legal rule—that the N.L.R.B. may not award back pay to claimants unless they testify notwithstanding the Employer's failure to plead any defense to the claim set forth in the back pay specification. The Board has established adequate procedures for ascertainment of back pay entitlement. There is no need to impose new procedures which, in effect, place the burden of proof as to unpled defensive matters on the General Counsel.

The Employer also wishes to eliminate its liability to 14 other employees who the Board concluded had made adequate efforts to find interim work during very brief periods of unemployment. In this respect the case is but a routine application of the general back pay principles articulated in *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941). The application of those rules by the Court of Appeals should not be disturbed.

I. The Court of Appeals applied well established principles in enforcing the award as to registrants for work.

More than forty years ago, in *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941), this Court held that the remedial provisions of the National Labor Relations Act, 29 U.S.C. § 160(c), must be exercised to effectuate the policies of the Act. To that end the Court held that the Board could not exclude employer evidence of willful losses or other matters in mitigation of back pay liability. *Id.*, 313 U.S. at 197-198. The Court did not announce any formula by which back pay entitlement should be calculated in a particular case. It simply ruled that the

Board "may give appropriate weight to a clearly unjustifiable refusal to take desirable new employment." *Id.*, 313 U.S. at 199-200.

The Board and the courts of appeal have developed standards for assessing employee efforts to mitigate. There is no conflict among the courts of appeal with regard to these standards. All have recognized that efforts to mitigate should be assessed over the entire back pay period and that victims of discrimination are entitled to a "grace period" following the discriminatory act before they are expected to take any steps to find interim work. *See e.g., N.L.R.B. v. Nickey Chevrolet Sales, Inc.*, 493 F.2d 103 (7th Cir.), *cert. denied*, 419 U.S. 834 (1974); *Saginaw Aggregates, Inc. v. N.L.R.B.*, 482 F.2d 946 (6th Cir. 1973).

Contrary to the Petitioner's claim, no court of appeals has ruled that an employee who makes no effort to find work except by registering with a state agency has failed to mitigate damages without regard to other facts including the duration of his unemployment. Rather, the courts of appeal have considered a host of facts and circumstances in assessing employee diligence in seeking work. Some of these are length of unemployment, reasonableness of belief that reinstatement is imminent, availability of work in the area for which the employee is qualified, number of applications for work and registration for work with the state.

The cases cited in the Petition for the proposition that registration for work is not alone sufficient to mitigate say no more than that a particular employee, under a particular constellation of facts, did not diligently seek work. Indeed one of the cases cited, *N.L.R.B. v. Mercy Peninsula Ambulance Service, Inc.*, 589 F.2d 1014 (9th Cir. 1979), was decided by the same circuit that rejected the suggestion for rehearing en banc in this case. There is no conflict in doctrine.

The Court of Appeals applied the accepted principles in light of the Record as a whole and concluded that the Board's finding that the Employer had not proved failure to mitigate was supported by substantial evidence. There is no uncertainty in the law which warrants disturbing the ruling.

The Court of Appeals was not required to deny enforcement of the award because the National Labor Relations Board, after petitioning for its enforcement, repudiated it. The National Labor Relations Act provides that the agency loses its power to modify its findings and order when the Record is filed upon petition for review or for enforcement with a court of appeals. 29 U.S.C. § 160(d) and (e). While the Court of Appeals had the authority to remand this case for reconsideration by the Board, it was not required to do so.

This Court has recognized the responsibility of the Board to make findings of fact, conclusions of law and an appropriate remedial order in the first instance. It does not follow that a reviewing court must ignore those findings, conclusions and order when an attorney for the Board announces to a reviewing court that the Board has had second thoughts. Subsections 10(d), (e) and (f) authorize the court to disregard those second thoughts; maintain jurisdiction; and, in the interest of finality, enforce the order if it is supported by substantial evidence in the Record. The Company has adverted to no case holding that a reviewing court may not exercise this discretion.

II. No court of appeals has required the Board's General Counsel to produce all claimants as a condition to award of back pay.

The Petition urges the Court to grant certiorari to resolve a conflict among the circuits concerning the burden to produce testimony from back pay claimants. There is no conflict in the circuits; and, if there were, the

Court should not resolve it in this case because the case can be disposed of on other grounds.

The Court of Appeals rejected Clear Pine's argument that claimants not called to testify should not have been awarded back pay. The Court reasoned that it is the employer's burden to produce testimony to support a defense of failure to search for interim employment and held that any duty the General Counsel may have to produce claimants to testify must be triggered by "the employer's specific demand" prior to the back pay hearing.[10] Having failed to make such demand, said the Court, the employer cannot complain of the absence of claimant testimony.

Two courts of appeal have refused to enforce back pay awards to employees who the General Counsel has not called to testify. In each case the respondent employer had pled the defense of willful loss of earnings and the General Counsel had nevertheless failed to produce claimants to testify. *N.L.R.B. v. Rice Lake Creamery Co.*, 365 F.2d 888 (D.C. Cir. 1966); *N.L.R.B. v. Mastro Plastics Corp.*, 354 F.2d 170 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966). Both courts, like the Ninth Circuit, adhered to the view that the burden to plead and prove failure to mitigate rests squarely with the respondent, not the General Counsel. They simply concluded that when the respondent raises specific mitigation issues in its pleadings the General Counsel, to whom evidence on such issues is more available, is required to cooperate to the extent of making witnesses available to testify at the hearing. Neither court has required that claimants testify in the absence of prior notice that respondent will argue that claimants willfully lost earnings. The

---

[10] The Court, speaking of a "demand", apparently referred to the N.L.R.B.'s internal guidelines which require the General Counsel to cooperate with a respondent who seeks assistance in procuring attendance of witnesses at a backpay hearing. N.L.R.B. Case-handling Manual (Part Three—Compliance Proceedings), Section 10733.

Second Circuit warned that its holding should not be misinterpreted:

> "We wish to make clear what we are not deciding when we conclude that the Board should produce the discriminatees to testify. *We do not mean that the employer need no longer raise this defense in his answer . . .*"

N.L.R.B. v. Mastro Plastics Corp., supra, 354 F.2d at 178 (emphasis added).

The D.C. Circuit concurred. *N.L.R.B. v. Rice Lake Creamery Co., supra,* 365 F.2d at 892. Consequently, when an employer who had failed to plead willful loss of earnings challenged a back pay award because the General Counsel had not produced claimants to testify the D.C. Circuit enforced the award. *Southland Manufacturing Corp. v. N.L.R.B.,* 475 F.2d 414 (D.C. Cir.), *cert. denied,* 414 U.S. 858 (1973). The court observed that the answer to the back pay specification had generally denied the accuracy of the interim earnings portion of the specification but had not even mentioned willful loss of earnings. Thus, the court held that the Board had no burden to produce witnesses.

The rule articulated by these courts would not produce a result different from that reached by the Ninth Circuit in this case. Under the *Mastro Plastics/Rice Creamery* rule the General Counsel has no duty to produce claimants unless the employer has first put the General Counsel on notice that it contends the claimants have incurred a willful loss of earnings by so pleading in its answer. Clear Pine concededly did not plead willful loss of earnings in its answer. And, contrary to the assertion in the Petition at 35, footnote 10, the Company did not move to amend its answer during the hearing to allege that defense and the administrative law judge did not grant such a motion. Rather, the administrative law judge overruled a motion to exclude evidence offered by the

employer on the willful idleness issue because the defense had not been pled. Tr. 348, l. 17-22. In any event, the Court of Appeals correctly refused to fault the General Counsel for not producing witnesses it had no way of knowing, prior to the hearing, could offer evidence material to any disputed issue of fact.

The Court's disposition of this case is not in conflict with the law of the District of Columbia or of the Second Circuit.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

LYNN-MARIE CRIDER
25 Cornell Avenue
Gladstone, OR 97027
(503) 656-1475

Counsel of Record
for Respondent
International Woodworkers
of America, Local 3-200

No. 85-720

Supreme Court, U.S.
FILED
DEC 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

CLEAR PINE MOULDINGS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney

National Labor Relations Board
Washington, D.C.20570

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether, in awarding backpay to make employees whole for an employer's failure to reinstate them on a timely basis following an unfair labor practice strike, the Board properly held that the employer failed to meet its burden of proving a willful loss of earnings as to employees who were available to testify concerning their efforts to find interim employment but whom the employer chose not to call to testify.

2. Whether, in the circumstances of this case, the court of appeals should have remanded for reconsideration, instead of enforcing, the Board's award of backpay to employees whose efforts to mitigate their losses pending reinstatement consisted only of registering at a state unemployment office.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutory provisions involved 1

Statement 2

Argument 6

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Alfred M. Lewis, Inc. v. *NLRB*, 681 F.2d 1154 7

Florence Printing Co. v. *NLRB*, 376 F.2d 216, cert. denied, 389 U.S. 840 7

Nickey Chevrolet Sales, Inc., 195 N.L.R.B. 395, enforced, 475 F.2d 1395 9

NLRB v. *Brown & Root, Inc.*, 311 F.2d 447 7

NLRB v. *Dodson's Market, Inc.*, 553 F.2d 617 7

NLRB v. *J.G. Boswell Co.*, 136 F.2d 585 7

NLRB v. *Madison Courier, Inc.*, 472 F.2d 1307 8

NLRB v. *Mastro Plastics Corp.*, 354 F.2d 170, cert. denied, 384 U.S. 972 ..... 7, 8

NLRB v. *Miami Coca-Cola Bottling Co.*, 360 F.2d 569 7

Page

Cases—Continued:

NLRB v. *Mooney Aircraft, Inc.*, 366 F.2d 809 7

NLRB v. *Rice Lake Creamery Co.*, 365 F.2d 888 ..... 7, 8

Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 ..... 7, 9

Top Manufacturing Co., 254 N.L.R.B. 976 9

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 1

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-720

CLEAR PINE MOULDINGS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is not reported. The decision and order of the National Labor Relations Board (Pet. App. 10a-50a), including the decision of the administrative law judge (Pet. App. 51a-146a), are reported at 268 N.L.R.B. 1044.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1985. A petition for rehearing was denied on July 10, 1985 (Pet. App. 147a-148a). The petition for a writ of certiorari was filed on October 8, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 3-4.

STATEMENT

1. Petitioner is a wood products manufacturer in Oregon. The Board found that petitioner committed numerous unfair labor practices by coercively interrogating and threatening employees, by discriminatorily disciplining an employee due to her union activities, by refusing to bargain in good faith and by making unilateral changes in certain terms and conditions of employment. The Board further found that petitioner's unfair labor practices had caused its employees to engage in a strike and that the employees were unfair labor practice strikers. The Board's order required petitioner to offer reinstatement to the unfair labor practice strikers and to make them whole for any losses caused by petitioner's failure to reinstate them in a timely manner after the strike.[1] The court of appeals enforced that order on July 25, 1980, and this Court denied certiorari. 632 F.2d 721 (9th Cir.), cert. denied, 451 U.S. 984 (1981).

2. Petitioner offered to reinstate the unfair labor practice strikers on November 25, 1977, "conditioned on the availability of suitable employment" (Pet. App. 56a). The strikers offered to return to work on November 28, 1977, but due to a shortage of openings at the time most were not reinstated until sometime during the period extending from December 31, 1977 to March 31, 1978 (GCX 1, at 1-13).[2] The Board and petitioner were unable to agree on the amount of backpay owed to strikers who were not immediately reinstated, and the Board began supplemental backpay proceedings to determine the amounts due. The Board's Regional Director issued a backpay specification setting forth the amount of

---

[1]The Board's unfair labor practice findings and order are reported at 238 N.L.R.B. 69 (1978).

[2]"GCX" refers to the General Counsel's exhibits in the supplemental backpay proceeding. "Tr." refers to the transcript of the hearing in that proceeding.

backpay alleged to be owed and also the known interim earnings of each employee. Petitioner filed a general answer denying that any backpay was due under the Board's order. Subsequently, petitioner filed amended answers in which it contended that it owed no backpay because the union allegedly had waived the strikers' rights to reinstatement; alternatively, petitioner contested the specific amounts due a number of individual employees. Pet. App. 67a-71a; GCX 1.

At the hearing held to resolve the issues raised by the backpay specification, petitioner for the first time raised the defense that certain employees had incurred a willful loss of earnings by failing to seek interim employment (Tr. 145-146, 345-346). Accordingly, petitioner introduced evidence to show that jobs were available at companies in the area when the strike ended (Pet. App. 119a-127a). In addition, petitioner called 14 employees to testify at the hearing (testifying employees), each of whom stated that he had made no effort to find interim employment but had only applied for unemployment compensation. Twenty-two other employees covered by the backpay specification (uncalled employees), although available to testify, were not called by either petitioner or the General Counsel, and petitioner made no specific claim at the hearing that those employees had failed to seek interim work.

Following the hearing, an administrative law judge (ALJ) issued a decision awarding backpay (Pet. App. 51a-146a). The ALJ rejected petitioner's contention that the union had waived the strikers' rights to reinstatement and also rejected its claim that the employees had willfully lost earnings by failing to seek interim employment. With respect to the latter contention, the ALJ found that, although petitioner had permissibly conditioned reinstatement "on the availability of suitable employment" (*id.* at 56a), without indicating when jobs might be available, the

strikers as a class could have entertained "a reasonable belief that reinstatement could occur any day" (*id.* at 140a) and therefore had no obligation to seek interim employment. He found further (*id.* at 140a-141a) that the evidence of employment conditions at other plants in the area did "not establish jobs readily available to these claimants." Accordingly, it was unnecessary for the ALJ to make findings with respect to the sufficiency of the mitigation efforts of individual employees. The ALJ awarded backpay to the 14 testifying employees and also to the 22 uncalled employees.[3]

In exceptions to the ALJ's decision filed with the Board, petitioner contended for the first time that the uncalled employees should also be denied backpay, arguing that the General Counsel had failed to meet his burden of showing that all employees covered by the backpay specification had not willfully lost earnings. The Board rejected petitioner's contentions and, in all respects relevant here, upheld the ALJ's award of backpay to the uncalled and the testifying employees (Pet. App. 10a-50a).[4]

---

[3]Five other employees covered by the backpay specification could not be located and thus neither their interim earnings nor their desire to return to work for petitioner could be verified. As to those employees, the ALJ, in accordance with Board policy, ordered that their backpay be held in escrow for a period of one year while efforts to verify their status were made, after which time the sums would either be disbursed or returned to petitioner (Pet. App. 144a n.20).

The ALJ also ordered backpay for six other employees who testified at the hearing that they did seek interim employment, and made adjustments to or eliminated the amounts specified for certain other employees. The ALJ's determinations concerning those employees are not in issue here.

[4]The Board, in findings not at issue here, found that two employees awarded backpay by the ALJ were disqualified due to strike misconduct and that another employee was disqualified because he had lawfully been discharged prior to the strike (Pet. App. 10a-50a).

3. Petitioner sought review of the Board's supplemental backpay decision in the court of appeals. On July 27, 1984, the Board filed a motion with the court seeking remand "to reconsider certain issues raised regarding the amounts of backpay due under the Board's order" (Pet. App. 149a-151a). The court denied the motion and instructed the Board to file a brief.

The Board's brief (at 8) repeated the request that the case be remanded because it had erred in adopting the ALJ's conclusion that the 14 testifying employees (who merely registered at the unemployment office) were "excused from the normal obligation to mitigate damages by seeking employment in the interim." The Board stated (*id.* at 8, 11) that it had "overlooked Board authority" holding that employees presented with a reinstatement offer indefinite as to the time of rehire are obliged to seek work in the interim and that generally "registration at a government employment office alone, is insufficient to establish reasonable diligence." The Board stated further (*id.* at 8) that, "although * * * backpay claimants 'need not instantly seek new work' " and are entitled to a brief grace period, the Board had never approved a grace period of the duration involved here. "As a consequence of * * * having overlooked prior case law indicating that employees having only an indefinite offer of reinstatement must mitigate by seeking interim employment, neither the administrative law judge nor the Board made findings concerning the sufficiency of each individual employee's efforts to seek interim employment" (*id.* at 8-9). Accordingly, the Board requested a remand so that it could make the necessary findings and correct its error in awarding backpay to the testifying employees.

The Board argued also (*id.* at 12-13) that, in the event the court denied its request for a remand, the court should deny enforcement with respect to the 14 testifying employees but

should grant enforcement as to the uncalled employees. Concerning the latter group, the Board argued that (*ibid.*) "[petitioner] clearly did not meet its burden of proving willful loss of earnings."

4. The court of appeals denied the Board's request for a remand and enforced the backpay order in full (Pet. App. 1a-9a). The court stated (*id.* at 5a) that "[t]he record as developed is sufficient for a backpay determination and the Board's decision adequately resolved the issues presented to it." On the merits, the court concluded (*ibid.*) that petitioner "has not carried its burden of proving that any of the * * * employees failed to exercise reasonable diligence in looking for interim work during the backpay period." In upholding the award of backpay to the uncalled employees, the court ruled (*id.* at 7a) that "[i]t is the employer who carries the burden of producing evidence and the testimony of * * * employees" in support of a willful loss of earnings defense. In addition, the court found "sufficient evidence to support the Board's decision to award backpay to those employees who testified that their efforts were limited to registering at [a] state agency" (*id.* at 6a). The court relied on the fact that "employees were returning to work rapidly and each of them could have reasonably expected to be back at Clear Pine on short notice," and also relied on prior Board decisions that, in the court's view, allowed employees a grace period "roughly equal in duration to the period here" (*id.* at 6a-7a). The court concluded that the "employees did not need to make, under the circumstances, a more diligent search for work" (*id.* at 7a).

ARGUMENT

1. Petitioner concedes (Pet. 31) "that the defense of willful loss of earnings is an affirmative defense, and that the burdens of pleading and persuasion rest on the employer." Petitioner nonetheless contends (Pet. 30-37) that once an employer raises that defense the burden is on the General

Counsel to produce testimony from each employee showing that he did not fail to seek interim employment. That contention is without merit and does not warrant this Court's review.

It is well-settled that a claim of willful loss of earnings through failure to seek interim employment "must be put in issue by [the employer] and is in no sense a part of the Board's case." *NLRB* v. *J.G. Boswell Co.*, 136 F.2d 585, 597 (9th Cir. 1943) (citing *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 199-200 (1941)). "[I]t is not practical, and it would significantly hamper the backpay remedy, if each discriminatee were required to prove the propriety of his efforts during the entire backpay period." *NLRB* v. *Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966). Accordingly, courts have uniformly placed the burden on the employer to produce the particular witnesses needed to establish this defense.[5]

Petitioner sought to meet its burden in this case by calling approximately 20 employees to testify about their efforts to find interim employment. Petitioner, however, chose not to call an additional group of available employees. Having failed to carry the burden of its defense as to those employees, petitioner cannot now escape backpay liability by contending that the burden of producing employee testimony was instead on the General Counsel. See *Florence Printing Co.* v. *NLRB*, 376 F.2d 216, 223 (4th Cir.), cert. denied, 389 U.S. 840 (1967).[6]

---

[5]See, *e.g.*, *Florence Printing Co.* v. *NLRB*, 376 F.2d 216, 221-223 (4th Cir.), cert. denied, 389 U.S. 840 (1967); *NLRB* v. *Mooney Aircraft, Inc.*, 366 F.2d 809, 812-814 (5th Cir. 1966); *NLRB* v. *Brown & Root, Inc.*, 311 F.2d 447, 454-455 (8th Cir. 1963); *Alfred M. Lewis, Inc.* v. *NLRB*, 681 F.2d 1154, 1156 (9th Cir. 1982); *NLRB* v. *Dodson's Market, Inc.*, 553 F.2d 617, 619 (9th Cir. 1977).

[6]Petitioner's reliance (Pet. 32-33) on the decisions in *NLRB* v. *Mastro Plastics Corp.*, 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966) and *NLRB* v. *Rice Lake Creamery Co.*, 365 F.2d 888 (D.C.

2. Petitioner also contends (Pet. 19-30) that the award of backpay to the 14 testifying employees is contrary to prior Board and court decisions. Although the Board believes that the court of appeals should have remanded the case to

---

Cir. 1966) is misplaced. In both cases the Board ordered that backpay for employees who had been unavailable to testify at the initial backpay hearing (either because they were in jail or could not be located) be placed in escrow in order " 'to afford the [employer] a reasonable opportunity to examine these claimants' " (*Mastro Plastics*, 354 F.2d at 175; see *Rice Lake Creamery*, 365 F.2d at 891). The Board, however, subsequently made the backpay awards final without giving the employers such an opportunity. The court held that under those circumstances the Board was obliged to produce the employees for examination by the employer before awarding backpay.

Here, in a manner consistent with those cases, the Board placed into escrow the backpay of five claimants who were unavailable and provided that the sums not be paid until petitioner has an opportunity to inquire as to their interim earnings and mitigation efforts (see page 4 note 3, *supra*). Nothing in either *Mastro Plastics* or *Rice Lake Creamery* requires the Board, against the great weight of authority (see note 5, *supra*) to offer the testimony of employees who are themselves available to an employer pursuing a mitigation defense.

Moreover, in both *Mastro Plastics* and *Rice Lake Creamery* the employers raised the willful loss of earnings defense in their pleadings, and had made clear prior to the backpay decision their intention to elicit testimony from the employees at issue. Here, in contrast, petitioner failed to raise the defense in either its initial or amended answers, stated at the hearing only that it was raising the defense as to an indeterminate number of employees (Tr. 145-146), and then proceeded to call only 20 employees to testify. It was only after the ALJ's decision awarding backpay that petitioner announced for the first time its desire to have testimony from employees it chose not to call.

Finally, there is no merit to petitioner's suggestion (Pet. 34-36) that its evidence of favorable employment conditions in the surrounding area required the General Counsel to produce each claimant to explain his failure to obtain an interim job. The Board, upheld by the court of appeals, correctly concluded that such evidence failed to meet the employer's burden of proving a defense of willful idleness on the "particular facts concerning each separate individual" as to whom the defense was raised. *NLRB* v. *Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972).

the Board for reconsideration of the mitigation issue as to these employees, we submit that, in the circumstances of this case, the issue does not warrant this Court's review.

The court of appeals did not take issue with the well-settled principles that backpay will not be awarded "for losses * * * willfully incurred" (*Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197-198 (1941)), and that generally an employee awaiting reinstatement must attempt to mitigate his losses by seeking interim employment. Although the Board now believes that the "grace periods" permitted here, which range from five weeks to more than three months, are excessive and not the equivalent of those sanctioned by the cases relied on by the court of appeals,[7] the issue turns on the application of a settled principle to the facts of this particular case. Such a fact-bound issue does not warrant review by this Court.

---

[7]See *Nickey Chevrolet Sales, Inc.*, 195 N.L.R.B. 395, 398 (1972), enforced, 475 F.2d 1395 (3d Cir. 1973); *Top Manufacturing Co.*, 254 N.L.R.B. 976, 979 (1981). In *Nickey Chevrolet*, the Board awarded backpay to an employee who received no valid offer of reinstatement for 18 months and who had waited for about six weeks from the date of his discharge before seeking interim work, where the evidence showed that the employee had registered for unemployment benefits within a week after his discharge and reported to the claims office every week until his benefits were exhausted. In *Top Manufacturing*, the Board held that an employee who, pursuant to his duty to mitigate, had sought and obtained an interim job that was due to start in three weeks was not obliged to seek still other interim work for that three-week period.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney

National Labor Relations Board

JANUARY 1986

DOJ-1986-01